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CALIFORNIA JURISPRUDENCE

A COMPLETE STATEMENT OF THE LAW AND PRACTICE OF THE STATE OF CALIFORNIA

Editor

WILLIAM M. McKINNEY

Editor Ruling Case Law,
Federal Statutes Annotated, Annotated Cases,
Encyclopaedia of Pleading
and Practice, Etc.

VOLUME III

APPEARANCE TO BAIL AND RECOGNIZANCE

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TITLES IN THIS VOLUME.

(*Italics indicate cross-reference titles.*)

	PAGE
APPEARANCE	1
Appointment, Power of	21
Apportionment Acts	21
APPRENTICESHIP	22
Appurtenance	26
ARBITRATION AND AWARD	27
ARCHITECTS	95
Argument of Counsel	111
Arms	111
Army	111
Arraignment	111
ARREST	112
Arrest of Judgment	159
ARSON	160
ASSAULT AND BATTERY	179
Assessments	229
Assignment of Errors	229
ASSIGNMENTS	230
ASSIGNMENTS FOR BENEFIT OF CREDITORS	312
ASSISTANCE, WRIT OF	332
ASSOCIATIONS	345
ASSUMPSIT	372
Asylums	396
ATTACHMENT	397
Attempt	558
ATTORNEY GENERAL	559
Attorney in Fact	575
ATTORNEYS AT LAW	576
Attornment	754
AUCTIONS	755
Auditors	765
AUTOMOBILES	766
Avulsion	1020
Award	1020
Baggage	1020
BAIL AND RECOGNIZANCE	1021

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CALIFORNIA JURISPRUDENCE

VOLUME III

APPEARANCE.

I. In General.

II. What Constitutes General Appearance.

III. Effect of General Appearance.

IV. Special Appearance.

I. In General.

1. Definitions and Distinctions.
2. Appearance by Party.
3. Appearance by Attorney.
4. Persons Affected.
5. Time for Voluntary Appearance.

II. What Constitutes General Appearance.

6. In General.
7. Demurrers and Answers.
8. Notices of Appearance.
9. Characterization as Special Appearance.

III. Effect of General Appearance.

10. Acquisition of Jurisdiction.
11. Waiver of Defect of Process.
12. Waiver of Other Irregularities.

IV. Special Appearance.

13. In General.
14. Special Appearance After General Appearance.
15. General Appearance After Special Appearance.

Cases are cited in this article to and including 181 Cal., 41 Cal. App. and 194 Pac.

I. In General.

§ 1. Definitions and Distinctions.—Appearance has been defined to be a coming into court as a party to a suit, or the formal proceeding by which a party submits himself to the jurisdiction of the court,[1] or the first act of the defendant in court.[2] Appearances are of two kinds,—general and special. A general appearance is one whereby the defendant submits himself to the jurisdiction of the court. A special appearance is one made merely for the purpose of testing the sufficiency of the process to bring the defendant within the jurisdiction of the court.[3] A clear distinction must be made between the two classes of appearances, for a general appearance confers jurisdiction upon the court,[4] while a special appearance does not.[5] The precise limits of this distinction require considerable discussion,[6] but it may be remarked at this place that if a person appears and objects only to the consideration of the case, or to any procedure in it because the court has not acquired jurisdiction of the person of the defendant, the appearance is special; but that if he appears and asks for any relief which could only be given to a party in a pending case, or which itself would be a regular proceeding in the case, the appearance is general.[7]

§ 2. Appearance by Party.—Any party to an action or proceeding may appear in court to protect or enforce his supposed rights, whether such party be a resident or a nonresident of California; and there is the cor-

1. Boehmer v. Big Rock Irrigation District, 117 Cal. 19, 48 Pac. 908 (quoting Bouvier).
2. 2 Ruling Case Law, p. 322.
3. 2 Ruling Case Law, p. 322.
4. See infra, § 10.
5. See infra, § 13.
6. See infra, §§ 6–9, treating the question of what constitutes a general appearance; and §§ 13–15, treating the question of what constitutes a special appearance.
7. Security Loan & Trust Co. v. Boston etc. Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; In re Clarke, 125 Cal. 388, 58 Pac. 22.

relative duty imposed upon any defendant who has been duly served with summons, or against whom summons has been issued and duly published, to appear in court, or be in default.[8] A party may appear either in propria persona or through an attorney,[9] but he cannot do both; and if, and as long as, he has an attorney of record, the court cannot recognize anyone in the conduct of the case except such attorney. It is indispensable to the orderly conduct of the case that if a party has engaged an attorney who appears in the case, that the attorney shall have the sole management and control of the action, so long as he is the attorney of record. The client, therefore, cannot assume control of the case as against his attorney.[10] Indeed, it is beyond the power of the court to demand the personal appearance of a party summoned without warrant of arrest, subpoena or attachment; and if such party appears by attorney, an order for the arrest of the client for contempt of court for not appearing in person is void.[11] The Civil Code provides that "if a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession or be barred."[12] This does not mean that he must appear in person, or that his appearance must be made in court; but it refers to any act of appearance made by an alien heir within this state, either in person or by attorney, such as the assertion of a claim to the property by acts of ownership, or by the exercise of disposition over the property.[13]

8. Lyons v. State, 67 Cal. 380, 7 Pac. 763.

9. See infra, § 3.

10. Boca etc. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718; Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89; Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164 (the leading case). See ATTORNEYS AT LAW.

11. Ex parte Gordan, 92 Cal. 478, 27 Am. St. Rep. 154, 28 Pac. 489.

12. Civ. Code, § 672. See ALIENAGE AND CITIZENSHIP. vol. 1, p. 923.

13. State v. Smith, 70 Cal. 153, 12 Pac. 121; Carrasco v. State, 67 Cal. 385, 7 Pac. 766.

§ 3. Appearance by Attorney.—Where an appearance is entered by an attorney it is presumed that the attorney possessed the required authority. Indeed, it has been said that the attorney's action in appearing will bind the party unless it be repudiated by clear proof of fraud or willful wrongdoing on the part of the attorney in the exercise of his ostensible authority. Hence, even an unauthorized appearance by an attorney, in the absence of fraud or tortious act, will not ordinarily give the party the right to attack the judgment, collaterally, on that ground. This subject is treated in another article in this work.[14] It may be observed in this place, however, that if an attorney who is authorized to appear for part only of several defendants, inadvertently files an answer for all and, upon discovering his mistake, obtains an order allowing him to withdraw his answer and substitute another, limited to the defendants for whom he is authorized to appear, the unauthorized appearance is canceled by such order and withdrawal.[1]

§ 4. Persons Affected.—As to the persons affected by the appearance of an attorney, it may be observed that the recital of an appearance in a record is not conclusive; and where it is general in its terms, as by a statement that an attorney has appeared for the defendants in an action, it will be deemed to be confined to those of the defendants who have been served with process.[2] A specific recital, however, of an appearance in either the judgment-roll or the record of a trial court will be sufficient to establish the appearance of a party; and such recital becomes conclusive evidence of an appearance, as against collateral attack of the judgment, where there is no issue of fraud raised.[3] The recital, in a decree of distribution, of an

14. See ATTORNEYS AT LAW. As to appearance by attorney in attachment cases, see ATTACHMENT.

1. Forbes v. Hyde, 31 Cal. 342.

2. Chester v. Miller, 13 Cal. 558. See, also, ATTORNEYS AT LAW.

3. Western Lumber & Mill Co. v. Merchants' Am. Co., 13 Cal. App. 4, 108 Pac. 891.

appearance by an attorney for the minor heirs of an intestate is to be deemed an appearance for those heirs only whom the attorney had been appointed to represent.[4]

Generally speaking, the appearance of an attorney on behalf of a minor will be presumed to have been authorized by the latter, so far as the consent of an infant can give authority; and it will be considered an appearance of the infant, and will be binding upon him, unless he expressly repudiates the attorney's appearance and acts done in his behalf, upon his attaining the age of majority.[5] But the appearance of an attorney for minor heirs at a hearing held upon petition for the sale of real property is not an appearance of the heirs where notice has not been served upon the latter. Such appearance on the part of the attorney cannot be made to be effectual to dispense with the statutory requirement of notice to the heirs.[6] On the other hand, a general guardian is authorized as well as obliged to appear for his ward; and the guardian's appearance in an action brought against his ward is an appearance of the latter, without service of summons upon him.[7] Indeed, this is expressly provided in the Code of Civil Procedure with reference to probate proceedings.[8] But the appearance of a guardian ad litem for an incompetent person is void without personal service of process upon the incompetent person.[9]

4. Pearson v. Pearson, 46 Cal. 609.

5. Childs v. Lauterman, 103 Cal. 387, 42 Am. St. Rep. 121, 37 Pac. 382. See INFANTS.

6. Campbell v. Drais, 125 Cal. 253, 57 Pac. 994; Randolph v. Bayue, 44 Cal. 366.

7. Redmond v. Peterson, 102 Cal. 595, 41 Am. St. Rep. 204, 36 Pac. 923; Smith v. McDonald, 42 Cal. 484.

8. Code Civ. Proc., § 1722 reads: "Whenever an infant, insane, or incompetent person has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice, or order of court concerning the estate of any deceased person in which the ward is interested, is equivalent to service upon the ward. Such guardian may also appear for his ward and waive any process, notice, or order to show cause. . . . "

9. McCloskey v. Sweeney, 66 Cal. 53, 4 Pac. 943; Gray v. Palmer, 9 Cal. 616. See GUARDIAN AND WARD.

§ 5. Time for Voluntary Appearance.—The Code of Civil Procedure contains two provisions as to the time within which a voluntary appearance may be made. The first provision, which is merely permissive, allows an appearance within one year after the complaint is filed.[10] The second provision, which is restrictive, requires dismissal of the action if there has been no service of process nor appearance within three years after the commencement of the action.[11] Pursuant to these provisions, it is the general rule, where there has been no service and return of process, that only the voluntary appearance of a defendant within three years from the commencement of the action will be effectual to give the court jurisdiction. Where no appearance has been made within that period, and the summons has not been served or has not been returned within that time, the action must be dismissed.[12] The fact that an appearance has been made after the expiration of the three years' limit cannot preclude the dismissal of the action.[13] Similarly, the voluntary appearance of a party in the appellate court after the expiration of the time limited for appeal cannot confer jurisdiction upon the appellate court. Holdings to this effect are confirmatory of the rule that, where a time limit is provided for the taking of an appeal, the effectiveness of a voluntary appearance of a party not

10. Code Civ. Proc., § 406, providing, that "at any time within the year after the complaint is filed, the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons."

11. Code Civ. Proc., § 581a, providing that "all . . . actions must be . . . dismissed, . . . unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served."

12. Hibernia Sav. & Loan Soc. v. Cochran, 141 Cal. 653, 75 Pac. 315; Siskiyou County Bank v. Hoyt, 132 Cal. 81, 64 Pac. 118.

13. Swortfiguer v. White, 141 Cal. 576, 75 Pac. 172; Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

properly notified in the appellate court is confined to the statutory period allowed for perfecting an appeal.[14]

Nevertheless, it has been said that if a defendant were to appear and answer four years after the complaint was filed and were to object to a dismissal, although no summons had been issued and no previous appearance made, the court could not then properly dismiss the action against the protest of all the parties.[15] Certainly an action is not to be dismissed where the appearance was made within three years, even if it was not filed until after three years.[16] Such an appearance may be used to prevent the dismissal of the action,[17] or to cause a dismissal already ordered to be set aside.[18]

Where an action has been brought against several defendants, some of whom have appeared and some of whom have not, the statutory rule does not prevent the dismissal of the action as to those who have not appeared, no summons having been served or returned; but it is to be construed as authorizing a dismissal against those defendants who have not appeared, and a prosecution of the action against those who have, whenever the court is justified in rendering judgment against the latter only.[1]

14. Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225; Niles v. Gonzales, 152 Cal. 90, 92 Pac. 74. See APPEAL AND ERROR.

15. Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006. Even the mandatory terms of the statute would not justify a dismissal in all cases as against the protest of the defendant who desired a trial. Anglo-California Bank v. Griswold, 153 Cal. 692, 96 Pac. 353.

16. Anglo-California Bank v. Griswold, 153 Cal. 692, 96 Pac. 353 (where written notice of appearance was given within two months after suit was commenced and was filed more than seven years later); Roth v. Superior Court, 147 Cal. 604, 82 Pac. 246 (where a stipulation giving the defendant time to plead was made the day after suit was commenced and was filed more than three years later); Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006 (where a stipulation for entry of judgment and stay of execution was made one day after suit was commenced and was filed more than thirteen years later).

17. Anglo-California Bank v. Griswold, 153 Cal. 692, 96 Pac. 353; Roth v. Superior Court, 147 Cal. 604, 82 Pac. 246.

18. Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006.

1. Peck v. Agnew, 126 Cal. 607, 59 Pac. 125.

II. WHAT CONSTITUTES GENERAL APPEARANCE.

§ 6. In General.—The code provides as follows:

"A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for him."

This section of the code,[2] enumerating the various modes of making a general appearance, was intended to exclude all doubt about equivocal acts as constituting an appearance. The reason for the statutory rule was to dispose of questions about which there might be a dispute.[3] It does not exclude an appearance by acts other than those enumerated in the statute, provided they are of an unequivocal character, showing a submission to the general jurisdiction of the court, such as those calling for affirmative relief.[4] Consequently, the statement that a defendant can appear in no other way than by demurrer, answer, or formal written notice,[5] is too broad. An act of a defendant by which he intentionally submits himself to the jurisdiction of the court for the purpose of obtaining any ruling or order of the court going to the merits of the case, as, for example, a motion to strike out part of the complaint, or the making of stipulations which may reasonably be construed to imply that the court in that action acquired jurisdiction of the person of the defendant, will be equivalent to an appearance, although not strictly in accordance with the terms of the code section above quoted.[6] In general it may therefore be said that if a party appears and asks for any relief

2. Code Civ. Proc., § 1014, based on Practice Act, § 523.

3. Davenport v. Superior Court (Cal.), 191 Pac. 911; Vrooman v. Lu Po Tai, 113 Cal. 302, 45 Pac. 470; Salmonson v. Streiffer, 13 Cal. App. 395, 110 Pac. 144.

4. Altpeter v. Postal Telegraph Cable Co., 26 Cal. App. 705, 148 Pac. 241.

5. Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470.

6. Davenport v. Superior Court (Cal.), 191 Pac. 911, per Shaw, J., reviewing the leading California cases.

which could only be given to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance,[7] no matter how carefully or expressly it may be stated that the appearance is special.[8] Thus it has been held that a defendant makes a general appearance by a written request to the plaintiff's attorney for a stipulation extending his time to plead, and by procuring, upon affidavit, an order of court to that effect; there being nothing in the request, stipulation or affidavit indicating that the appearance was intended to be special.[9] Similarly it has been held that a motion for a continuance is a general appearance, notwithstanding the motion was oral and was denied.[10] Nevertheless, it has been said that "the words 'answer' and 'demur' are obviously words of enumeration, and that there cannot on received principles be interpolated into the text notices of motion for new trials, notices of appeal, nor any other paper served incidentally in the conduct of judicial proceedings, the direct and principal purpose of which is, not to give notice of appearance, but to give notice of a step taken or about to be taken in the cause."[11] Obtaining an order extending the time in which the defendant may plead is not a general appearance where the defendant within the time allowed moves to set aside a pretended service of summons.[12]

Within the rule that an action is to be dismissed if there has been no service nor appearance within three years,[13] a sufficient appearance may be found in a stip-

7. Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191; Security Loan etc. Co. v. Boston etc. Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; In re Clarke, 125 Cal. 388, 58 Pac. 22.

8. See infra, § 9, where the rule is stated and examples are given.

9. California Pine Box & L. Co. v. Superior Court, 13 Cal. App. 65, 108 Pac. 882.

10. Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191.

11. Steinbach v. Leese, 27 Cal. 295; Salmonson v. Streiffer, 13 Cal. App. 395, 110 Pac. 144.

12. Davenport v. Superior Court (Cal.), 191 Pac. 911; compare Payne v. Pullan (Cal. App.), 187 Pac. 127.

13. See supra, § 5.

ulation for entry of judgment and stay of execution,[14] or a stipulation giving the defendant time to plead.[15] It cannot be found, however, in a mere oral request made by a defendant's attorney of a plaintiff to forego the service of summons, to allow an extension of time in which to plead, or an oral authority given by a defendant to a plaintiff to enter judgment against him.[16]

§ 7. Demurrers and Answers.—In accordance with the statutory provision,[17] it is the rule that filing a demurrer is a general appearance.[18] It would seem, however, that where a party limits his ground of demurrer to the court's lack of jurisdiction over his person, this should not be deemed a general appearance; but there is no authority for this supposition which, though resting on the reasoning of a well-considered case,[19] is in contravention of the statutory rule, strictly applied. It was held in an early case that the filing of a demurrer on the ground that the court has no jurisdiction of the subject matter of the action is a general appearance. Regardless of statutory enactment, this is the logical view, for the demurrer stated is an objection differing from and exceeding the objection to the court's jurisdiction over the person of the defendant.[20] Similarly, since a motion to dismiss an action, because of the court's want of jurisdiction of the subject matter of the action, amounts in legal effect to a demurrer on that ground, and calls

14. Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006.

15. Roth v. Superior Court, 147 Cal. 604, 82 Pac. 246.

16. Benson v. Benson, 176 Cal. 649, 169 Pac. 369; White v. Superior Court, 126 Cal. 245, 58 Pac. 450.

17. See supra, § 6.

18. Quackenbush v. Darrough (Cal. App.), 186 Pac. 1044; Davidson v. Graham, 25 Cal. App. 484, 144 Pac. 147.

19. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317.

20. Clark v. Forbes, 34 Cal. App. 524, 168 Pac. 155. See, also, Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317, and In re Clarke, 125 Cal. 388, 58 Pac. 22, where the same conclusion was reached with respect to similar demurrers, though characterized as special appearances.

for relief which only a party to the action may demand, it has also been held to constitute a general appearance.[1]

The same rule applies to the filing of an answer.[2] Since it is the purpose of an answer to contest the plaintiff's allegations, so far as may be, this is pre-eminently the "coming into court" which is the purpose and meaning of a general appearance.[3] Thus, it has been held that the filing of an answer to an order to show cause is a general appearance.[4]

§ 8. Notices of Appearance.—Among the methods of appearance enumerated by statute, are written notice of appearance by the party or notice of appearance for him by an attorney.[5] The written notice of appearance provided for is a document to be drawn up especially for that purpose, and service of it is to antedate, or to be contemporaneous with, the service of all other notices and papers.[6] Thus, a signature by attorneys at the foot of an affidavit made by another person, the signature of the attorneys not being required, cannot be considered an appearance by the attorneys.[7] Nor does a defendant appear by taking from a plaintiff, and filing, a stipulation extending his time to answer, where such stipulation is not signed by the attorneys for both parties.[8] Similarly a notice of continuance, appearing on the record of an action, will not supply the want of an express notice of appearance, where there was nothing further done by the party to show an appearance in the action.[9]

1. Roberts v. Superior Court, 30 Cal. App. 714, 159 Pac. 465.
2. Code Civ. Proc., § 1014, based on Practice Act, § 523.
3. Ghiradelli v. Greene, 56 Cal. 629; Hayes v. Shattuck, 21 Cal. 51.
4. Ex parte Cohen, 5 Cal. 494.
5. See supra, § 6, quoting Code Civ. Proc., § 1014.
6. Steinbach v. Leese, 27 Cal. 295.
7. Benton v. Budd, 120 Cal. 329, 52 Pac. 851.
8. Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470.
9. Norblett v. Farwell, 38 Cal. 155.

On the other hand, the written acknowledgment on the part of a defendant of proper service of summons upon him, and his consent in writing to an entry of the decree against him as prayed for, is sufficiently clear in its purport as a submission to the jurisdiction of the court to be deemed a good notice of appearance.[10] So, also, where the attorneys filed a notice that they had been retained by, and appeared for, a defendant, this is a sufficient notice of appearance.[11]

It is to be noted that, while the statute requires the notice of appearance, when given by a party personally, to be in writing, such requirement is not exacted when the notice is given for the party by an attorney. In such case, it need not be in writing, but may be given by the act of appearing in open court, upon an application for such relief as can only be granted upon the assumption that the party has submitted to the jurisdiction of the court.[12] But a mere oral authority given by the attorney of a defendant to the plaintiff, or his attorney, to have judgment entered against defendant, is not such an overt act of the attorney as will amount to a notice of defendant's appearance in the action, the defendant not having been served with process, and no further step having been taken by him in the action.[13]

§ 9. Characterization as Special Appearance.—In determining whether an appearance is general or special, the characterization given it by the party is of no consequence whatever.[14] If he appears and objects only to

10. Foote v. Richmond, 42 Cal. 439.

11. Dyer v. North, 44 Cal. 157.

12. Salmonson v. Streiffer, 13 Cal. App. 395, 110 Pac. 144.

13. Siskiyou County Bank v. Hoyt, 132 Cal. 81, 64 Pac. 118.

14. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; Security Loan & Trust Co. v. Boston etc. Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; In re Clarke, 125 Cal. 388, 58 Pac. 22 (a leading case); Roberts v. Superior Court, 30 Cal. App. 714, 159 Pac. 465; Maclay Company v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364; Nisbet v. Clio Min. Co., 2 Cal. App. 436, 83 Pac. 1077.

the consideration of the case, or to any procedure in it, because the court has not acquired jurisdiction of the person of the defendant, the appearance is special, and no statement to that effect in the notice or motion is required or could have any effect if made. On the other hand, if he appears and asks for any relief which could only be given to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance no matter how carefully or expressly it may be stated that the appearance is special. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material.[15] Pursuant to this rule, appearances characterized as special have been held general where the party demurred on the ground of want of jurisdiction of the subject of the action;[16] demurred on the ground of want of jurisdiction of the subject of the action and for insufficiency of the statement of facts;[17] moved to dismiss the complaint on the ground that the court was without jurisdiction of the subject matter of the litigation;[18] moved to vacate a judgment on the ground that the court was without jurisdiction, that it was not supported by the pleadings, and that the defaults of the defendant were not entered;[19] or moved to vacate the judgment upon grounds other than a want of jurisdiction of the person.[20]

15. Security Loan etc. Co. v. Boston etc. Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; In re Clarke, 125 Cal. 388, 58 Pac. 22; Roberts v. Superior Court, 30 Cal. App. 714, 159 Pac. 465.

16. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317.

17. In re Clarke, 125 Cal. 388, 58 Pac. 22.

18. Roberts v. Superior Court, 30 Cal. App. 714, 159 Pac. 465.

19. Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364.

20. Security Loan & Trust Co. v. Boston etc. Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296.

III. EFFECT OF GENERAL APPEARANCE.

§ 10. Acquisition of Jurisdiction.—The rule is well established that where a party to an action or proceeding voluntarily makes a general appearance, the court acquires jurisdiction over his person, any defect or absence of process notwithstanding.[1] No matter how faulty or radically defective the process may be by which a party is sought to be brought into court, if the party appears, without objection, that fact confers upon the court jurisdiction over the person. Thus a trustee of an express trust may submit himself to the jurisdiction of the court, by appearing and answering a petition and citation issued from the probate department of the superior court.[2] So, also, where an action is brought against a person who dies before summons is served upon him, and his executrix is made defendant in the action and appears without service of process, such voluntary appearance on the part of the executrix gives the court jurisdiction.[3] Voluntary appearance by a person not named in the complaint of an action will be held effective to subject the person so appearing to the jurisdiction of the court without a complaint in intervention, where the party so appearing relies upon the name of a fictitious person inserted in the complaint, and states that he was sued under that fictitious name, setting forth his interest in the subject matter of the action, by his answer. A judgment entered against the party so appearing, under his true name, is valid.[4] It should be noted,

1. Ex parte Macdonald (Cal. App.), 187 Pac. 991; Hibernia Sav. & Loan Soc. v. Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Mahlstadt v. Blanc, 34 Cal. 577; Hayes v. Shattuck, 21 Cal. 51; Reed v. Hollister (Cal. App.), 186 Pac. 819; Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351; Wall v. Superior Court (Cal. App.), 192 Pac. 1321.

2. In re Thompson's Estate, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508.

3. Union Savings Bk. v. Barrett, 132 Cal. 453, 64 Pac. 713, 1071.

4. Johnston v. San Francisco Savings Union, 75 Cal. 134, 7 Am. St. Rep. 129, 16 Pac. 753.

however, that an attempt to make a renewed appearance, by a party to an action, after judgment has been entered in the action, is ineffectual to revive the jurisdiction of the court which has been surrendered by the entry of judgment.[5]

If the record shows that a defendant appeared by attorney, this is enough to prove that the court acquired jurisdiction over the defendant's person. If the attorney appeared without authority, that fact cannot be shown in a collateral attack upon a judgment.[6] Thus, if an attorney enters appearance for a defendant who is concealing himself, without objecting to the lack of service of summons upon the defendant, this is sufficient to give the court jurisdiction over the defendant.[7] But the appearance of an attorney for minor heirs in a probate proceeding is not sufficient to confer jurisdiction over the persons of the minors, where the latter were not served with statutory notices of a hearing for the sale of real estate.[8]

§ 11. Waiver of Defect of Process.—The rule that voluntary appearance is a waiver of issuance or service of summons, as well as of any defect thereof, has been uniformly followed in California,[9] and is incorporated in the Code of Civil Procedure, where it is said that

"The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him."[10]

5. O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225.

6. Mahoney v. Middleton, 41 Cal. 41; Carpentier v. City of Oakland, 30 Cal. 439; Seale v. McLaughlin, 28 Cal. 668. See ATTORNEYS AT LAW.

7. Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122.

8. Campbell v. Drais, 125 Cal. 253, 57 Pac. 994. As to persons affected by the appearance of an attorney, see supra, § 4.

9. Sox v. Clark, 180 Cal. 287, 180 Pac. 821; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Desmond v. Superior Court, 59 Cal. 274; Randall v. Falkner, 41 Cal. 242; Hayes v. Shattuck, 21 Cal. 51; Cronise v. Carghill, 4 Cal. 120; Tropical Inv. Co. v. Brown (Cal. App.), 187 Pac. 133; Drake v. Duvenick, 1 Cal. Unrep. 678.

10. Code Civ. Proc., § 416. See, also, Code Civ. Proc., § 406, which

As the reason for the rule, it has been said that the only purpose of the summons is to bring the defendant into court; and when he appears and answers, he waives any defect in the summons.[11] Under the California practice, the plaintiff, by filing his complaint, goes himself into court, and although he may not choose to take out a summons, he cannot object to the defendant coming in and answering any more than he could object to the defendant's voluntary appearance after the plaintiff had taken out a summons which he did not choose to serve.[12] The voluntary appearance of a party, so as to obviate the issuance or service and return of process, is established by a recital thereof in the judgment, and it need not be made part of the judgment-roll.[13] Indeed, it has been held that the voluntary appearance of a person as a party to an action is equivalent to service of summons upon that person, even where such person is not named, by his true name, in the complaint. A person thus appearing waives lack of personal service just as much as a party to the action does who has been named in the complaint.[14] A notice of appeal, like the issuance of a summons, may be waived; and the voluntary appearance of a party in the appellate court, as by the giving of a notice of appearance, is equivalent to a personal service of the notice of appeal, and waives the absence or defect thereof.[15] The rule applies, also, in the case of the voluntary appearance of parties to probate proceedings, for this is a waiver of service of citation, or of an irregularity or defect thereof.[16]

provides that "the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons."

11. Randall v. Falkner, 41 Cal. 242; Hayes v. Shattuck, 21 Cal. 51.

12. Hayes v. Shattuck, 21 Cal. 51.

13. Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026.

14. Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. 867.

15. Hibernia Sav. & Loan Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175. See APPEAL AND ERROR.

16. Johnson v. Tyson, 45 Cal. 257; Abila v. Padilla, 14 Cal. 103.

§ 12. Waiver of Other Irregularities.—Generally, any defect of a complaint, such as the use of a wrong name of the defendant, is waived by his appearance, and his answer by his true name.[17] Thus, where the defendant appears and pleads to an amended complaint, which, in effect, states a new cause of action, and therefore is improperly brought in the manner adopted, such appearance is a waiver of the improper mode of amending the complaint.[18] And where a defendant appears, without objecting to an unlawful time limit set for his pleading, as stated in the summons, such objection is waived.[19] So, also, where notice is required by law to be given a party, appearance without notice, or upon defective notice, is a waiver of such omission or defect.[20] This is true also of a party appearing before an officer for the purpose of participating in the taking of a deposition,[1] or of a party appearing at probate proceedings.[2] Voluntary appearance by a party to an action to quiet title waives the results of an omission to record lis pendens, and is equivalent to the notice given thereby, as to that party.[3] Similarly, the appearance of the defendant in a suit under the McEnerney Act waives any objection that might be open to the regularity of the steps taken in the suit prior to such appearance by him.[4] So, also, the appearance of a defendant on a cross-complaint waives any objection to the regularity of such cross-complaint,

17. Mahon v. San Rafael T. Road Co., 49 Cal. 269.

18. Groom v. Bangs, 153 Cal. 456, 96 Pac. 503.

19. Abbott v. Kellogg, 18 Cal. App. 429, 123 Pac. 227.

20. In re Yoell, 131 Cal. 581, 63 Pac. 913; Matthews v. Superior Court, 70 Cal. 527, 11 Pac. 665; Spring Valley Water Works v. Schottler, 62 Cal. 49; Shay v. Superior Court, 57 Cal. 541.

1. Jones v. Lowe, 9 Cal. 68.

2. Estate of Walden, 168 Cal. 759, 145 Pac. 100; Estate of Pratt, 119 Cal. 153, 51 Pac. 1099. See Code Civ. Proc., § 1306, providing at the time of hearing the proof of the will, "the court, unless the parties appear, must require proof that the notice has been given."

3. Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 649, 95 Pac. 668.

4. Faxon v. All Persons, 166 Cal. 707, L. R. A. 1916B, 1209, 137 Pac. 919; Hynes v. All Persons, 19 Cal. App. 185, 125 Pac. 253.

unless stated in a demurrer, as well as the right to object to insufficient service thereof.[5]

IV. SPECIAL APPEARANCE.

§ 13. In General.—If a defendant wishes to insist that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. A plea based upon lack of jurisdiction, presupposing a special appearance, is purely a dilatory plea and amounts to no more than the declaration of the defendant that he has ~~held~~ had actual notice, is actually in court, but, for want or defect of process, is not legally before the court. When a defendant wishes to avail himself of it, he must stand upon his naked legal right, and seek nothing further.[6] In accordance with this principle, it has been held that the appearance of a party for the single purpose of moving to set aside or vacate a judgment, for want of jurisdiction over his person is a special appearance only, and does not waive such want of jurisdiction.[7] Similarly, a notice that a defendant appears for the sole purpose of moving to quash the summons is a sufficient appearance to entitle him to be heard upon the motion, but it is not a general appearance.[8] And where, such motion having been made, and granted, in a justice's court, and a judgment having been entered thereon, the plaintiff appeals, and the defendant appears in the superior court for the only purpose of moving to dismiss

<See "Erratum", 1926 Supp. 186>

5. Lowe v. Superior Court, 165 Cal. 708, 134 Pac. 190; Roberts v. Buckingham, 172 Cal. 458, 156 Pac. 1018.

6. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; Security Loan & Trust Co. v. Boston etc. Fruit Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296.

7. Gray v. Hawes, 8 Cal. 562; Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364.

8. Lander v. Flemming, 47 Cal. 614; Southern Pac. R. R. Co. v. Superior Court, 59 Cal. 471. A motion to quash the service of summons is undoubtedly special if limited solely to a request for that specific relief. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317.

the appeal, such appearance on his part remains special, and does not confer jurisdiction upon the superior court, beyond the power to dispose of the appeal.[9] An appearance for the sole purpose of moving to dismiss an action for want of prosecution is not a general appearance, and does not waive the want of issuance or of service of summons;[10] and it is immaterial whether or not the notice of such motion declares that the appearance is special only.[11] Similarly, the appearance of a defendant for the purpose of moving to strike out an amended complaint and to dismiss the action is special only, and not a waiver of service of summons; and the defendant's request of the court of an extension of time to move or plead is an act ancillary to such motion only, and does not make the motion a general appearance.[12] It is doubtful, however, whether this ruling is still law, in so far as it holds that a motion or request for an extension of time in which to plead is not, in effect, a general appearance. This was held to be a general appearance in a recent decision.[13]

§ 14. Special Appearance After General Appearance.— Where a party appears generally in an action by filing an answer and afterwards claims to appear specially, for the purpose of moving for a continuance, it seems that this is ineffectual to withdraw his submission to the jurisdiction of the court.[14] This doctrine confirms the rule that the character of the appearance of a party is determined by the manner of his appearing

9. Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471.

10. Linden Gravel Mining Co. v. Sheplar, 53 Cal. 245.

11. Anderson v. Naver, 25 Cal. App. 151, 143 Pac. 555.

12. Powers v. Braly, 75 Cal. 237, 17 Pac. 197.

13. Payne v. Pullan (Cal. App.), 187 Pac. 127.

14. See Sheldon v. Landwehr, 159 Cal. 778, 116 Pac. 44, where the court says: "Assuming that he could thereafter limit his appearance to a special purpose, he certainly waived such limitation by remaining during the trial, cross-examining witnesses, making objections," etc.

originally, and by the relief asked, but not by the name which the party gives to his appearance. It has, however, been held that a defendant, who has been served with summons after unreasonable delay, does not waive the privilege of moving for a dismissal of the action by appearing generally and pleading to the complaint, where such pleading is accompanied by a motion for change of venue.[15] But the motion to dismiss, in the case in which the decision was rendered, did not constitute a special appearance, for by the service of summons the court had acquired jurisdiction, and, therefore, the motion to dismiss was addressed to the discretion of the court only. Where, upon the record of an action being taken to the federal supreme court, a general appearance is entered for the respondent by the inadvertence of the clerk, such entry cannot be altered by the clerk into a special appearance, through instructions of the respondent's counsel. No withdrawal of the general appearance and alteration into a special appearance can be effected without leave of court.[16]

§ 15. General Appearance After Special Appearance.— Although some of the earlier decisions in California declare that a defendant who has appeared for the sole purpose of questioning the service of process upon him and whose motion in this behalf has been denied does not, by subsequently answering to the merits, lose his right to stand upon his objection to the jurisdiction,[17] this rule has been criticised and overruled in more recent cases. Thus it has been said the rule seems unjust and illogical, in that it gives to the defendant, whose objections to the jurisdiction of the court have been erroneously overruled, an opportunity to go to trial, and if the judg-

15. Witter v. Phelps, 163 Cal. 655, 126 Pac. 593.

16. United States v. Armejo (U. S.), 18 L. Ed. 247.

17. Kent v. West, 50 Cal. 185; Lyman v. Milton, 44 Cal. 630; Deidesheimer v. Brown, 8 Cal. 339.

ment is favorable, to abide by it, and if it is unfavorable, to secure a reversal, giving to the plaintiff no such advantage.[18] Consequently, it has been squarely held in a recent case that a defendant who answers and goes to trial upon the merits after his motion to set aside the service of summons has been denied, thereby waives his right to insist that the ~~judgment~~ jurisdiction of his person has not been obtained.[19] Where a defendant appears specially, for the purpose of moving to set aside the summons, and pending the making of that motion, moves for and takes an order granting an extension of time in which to plead in case of the former motion being denied, he appears generally and waives the objection expressed in his previous special appearance.[20]

<See "Erratum", 1926 Supp. 785>

18. In re Clarke, 125 Cal. 388, 58 Pac. 22. In saying that the early California rule does not prevail elsewhere, the court fell into error, for the former rule, now unhappily abandoned in California, is the majority rule in the United States and has often been upheld by the federal supreme court. See 2 Ruling Case Law, pp. 339, 340; notes, 16 L. R. A. (N. S.) 177.

19. Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 Pac. 792. This appears to be the only decision contrary to the former rule, for the cases which it cites as overruling the earlier doctrine all seem to have involved a general appearance accompanying, rather than following, a special appearance.

20. Payne v. Pullan (Cal. App.), 187 Pac. 127.

APPOINTMENT, POWER OF.

See POWERS.

APPORTIONMENT ACTS.

See ELECTIONS.

APPRENTICESHIP.

1. In General.
2. To Whom and by Whom Minor may be Bound.
3. The Contract of Apprenticeship, Generally.
4. Liability of Various Persons.
5. Discharge of Parties from the Contract.

§ 1. In General.—The term "apprentice," as it is generally used, refers to a minor who, by an indenture, has bound himself, or with his consent has been bound, in the employ of another for a certain period of time during which such other is to instruct him in some trade, art, or occupation.[1] Under the common law the courts refused to recognize the validity of contracts of apprenticeship, but by virtue of certain statutes in some of the states a binding contract of this kind may be made.[2] The legislature of California has authorized the binding out of minors under contracts of apprenticeship, prescribing the method of procedure and defining the rights and liabilities of the parties to the contract.[3]

It has been observed by a writer upon the subject that the practice of binding infants to service has fallen almost completely into disuse.[4] This assertion is amply borne out by the fact that no decision has been found rendered by the courts of this state under the code provisions above referred to; nor, in fact, has any decision of the state courts been found which touches directly upon the subject of apprentices.

1. 1 Bl. Com. 426; 2 Kent's Com. 211.
2. 2 Ruling Case Law, p. 343, §§ 1, 2.
3. Civ. Code, §§ 264–276.
4. 2 Ruling Case Law, p. 343, § 1.

Cases are cited in this article to and including 181 Cal., 40 Cal. App. and 193 Pac.

§ 2. To Whom and by Whom Minor may be Bound.—Every minor of the age of fourteen years or upward may be bound by indenture as an apprentice to any mechanical trade or art or to the occupation of farming for any period not extending beyond minority, that is, to the age of twenty-one years, if a male, or to the age of eighteen years, if a female.[5] The minor may, with his consent, be bound by his father, or in case of his father's death or incompetency, by his mother or legal guardian. If the minor has no parent or guardian competent to act for him, with the approval of the court, he may bind himself. If a child is illegitimate, the mother alone has power to bind him. But if the mother of a minor, whether legitimate or illegitimate, marries after his birth, she cannot bind him without the approval of the superior court. Provision is also made by the law for the binding of a minor by executors acting under certain directions of a testator expressed in his will.[6]

When a minor is poor and homeless, or a charge upon the county or state, the court may, with his consent, bind him as an apprentice during his minority. Proceedings therefor may be instituted by any citizen, and no fee must be charged by any officer for any act in connection therewith.[7] Under the code, the question as to the capacity or incapacity of a parent to bind out a minor must be decided by a jury trial.[8]

§ 3. The Contract of Apprenticeship, Generally.—Certain formalities must be observed in the execution of an indenture of apprenticeship in order to render it valid and binding. It must be executed in duplicate, and must state the age of the minor, and, except as the statute may otherwise provide, it must show his consent to be bound, must be signed by him, the person binding, and the

5. Civ. Code, § 264.
6. Civ. Code, § 265.
7. Civ. Code, § 268. See infra, § 3, as to the duty of the master toward such minors.
8. Civ. Code, § 267.

master; and when made with the approval of the superior court, a certified copy of the order of approval must be attached to the indenture. The master is to be provided with a copy of the indenture and another is to be kept for the use of the minor by the parent or guardian of the minor when executed by him, or, when made with the approval of the court, it must be filed and deposited with the clerk for the use of the minor. In case of the death of the master the indenture is no longer binding. Every indenture entered into except as the statute provides is, as against the apprentice, absolutely void.[9]

Duties of various persons.—A master must not remove his apprentice out of the state, and must pay and deliver to him the money, clothes and other property to which he is entitled under the indenture of apprenticeship, to be held by him as his sole property.[10] The master must give, or cause to be given to the minor bound to the apprenticeship, the rudiments of an education, and he must also give to such minor the requisite instruction in the different branches of his trade or calling.[11]

Parents and guardians and the court must, from time to time, inquire into the treatment of children bound by them respectively, or with their approval. Where the apprentices have been bound by the court or with its approval, the judges of the court are responsible for their charge, "and must defend them from all cruelty, neglect, breach of contract or misconduct on the part of their masters."[12] The superior court must hear all complaints of apprentices against their masters, and must hear and determine such case and make such order therein as will relieve the party in the future.[13]

9. Civ. Code, § 266.
10. Civ. Code, § 269.
11. Civ. Code, § 268.
12. Civ. Code, § 270. See LABOR.
13. Civ. Code, § 271.

§ 4. Liability of Various Persons —*Of master.*—Every master is liable to an action on the indenture for a breach of any covenant thereof on his part. All damages recovered in such an action belong to the minor and must be paid to him or her upon reaching the age of majority. If no action is brought during the minority of the apprentice, it may be commenced by him in his own name at any time within two years after his coming of age.[14]

Liability of apprentice, and parent or guardian.—An apprentice who is guilty of any gross misbehavior, or refusal to do his duty, or willful neglect thereof is liable to the complaint of his master in the superior court of the county wherein the apprentice resides. The code prescribes the procedure in such cases, and provides for execution for costs in certain cases against the parent or guardian, or, if there be no parent or guardian, against the minor, to be recovered against him by action after he arrives at full age.[15]

Criminal liability for enticing apprentice away.—It is a misdemeanor for any person to entice, counsel or persuade an apprentice to run away, or to harbor or conceal him knowing him to be a runaway.[16]

§ 5. Discharge of Parties from the Contract.—The court has the power, where circumstances require it, to discharge an apprentice from his apprenticeship, and in such a case must make such an adjustment between the parties to the contract as seems just and reasonable. Moreover, if the apprentice so discharged was originally bound by the court, it must, if found necessary, again bind such minor, if under age.[17] It has been pointed out that the master must not remove his apprentice out of the state.[18] When, however, the master wishes to re-

14. Civ. Code, § 273.
15. Civ. Code, § 274.
16. Civ. Code, § 275; Pen. Code, § 646.
17. Civ. Code, § 272.
18. See supra, § 2.

move out of the state or to quit his trade or business, he may be discharged from the indenture upon satisfying the court that he has done justice to the apprentice for the time he has had charge of him. And the court may, if necessary, again bind the apprentice.[19] Of course, the death of the master discharges the minor from the indenture of apprenticeship.[20]

19. Civ. Code, § 276.
20. Civ. Code, § 266. See supra, § 2.

(E. H. R.)

APPURTENANCE.

See COVENANTS; EASEMENTS; FIXTURES; LANDLORD AND TENANT; REAL PROPERTY; WATERS.

ARBITRATION AND AWARD.

I. INTRODUCTORY.
II. THE SUBMISSION.
III. ARBITRATORS AND THEIR PROCEEDINGS.
IV. THE AWARD.

I. Introductory.

1. Definitions and Distinctions—Scope of Article.
2. Existence of Controversy as Fixing Character of Proceeding.
3. Questions of Price and Value, Generally.
4. Nature of Investigation as a Determining Factor.
5. Survey of California Law.
6. Nature of Statutory Proceedings—Policy of the Law.
7. Statutory and Common-law Arbitrations Distinguished.

II. The Submission.

8. Parties.
9. Jurisdiction of Statutory Proceedings.
10. Jurisdiction as Depending on Clerk's Entry.
11. Subjects of Arbitration.
12. Form and Contents of Submission.
13. Rule as to Naming of Arbitrators.
14. Submission Pending Suit.
15. Submission as Condition Precedent to Suit, Generally.
16. Necessity that Stipulation be Valid and Pertinent.
17. Condition Precedent as to Sureties.
18. Waiver of Condition.
19. Revocation.
20. Particular Effects of Submission.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 194 Pac.

III. Arbitrators and Their Proceedings.

21. Qualifications and Induction.
22. Proceedings in General.
23. Notice of Hearing.
24. Reception of Evidence.
25. Compensation.

IV. The Award.

26. In General.
27. Conclusiveness.
28. Conclusiveness of Appraisals, etc.
29. Certainty and Finality—Valid Awards.
30. Invalid Awards.
31. Inadequacy, Generally—Ita Quod Doctrine Abolished.
32. Award as Coextensive With the Submission.
33. Rule Where Powers of Arbitrators Have Been Exceeded—In General.
34. Rule Applied to Partnership Arbitrations.
35. Impeachment for Mistake, Generally.
36. Correction of Mistake in Award.
37. Fraud.
38. Misconduct.
39. Award of Costs.
40. Entry of Award as Judgment—Statutory Provisions.
41. Entry by Clerk.
42. Action on Award.
43. Pleading.
44. Modifying and Vacating Award—In General.
45. Award Good in Part and Bad in Part.
46. Stay of Proceedings—Motion to Modify.
47. Waiver of Defects.
48. Appeals—Jurisdiction and Subject Matter.
49. Procedure and Judgment on Appeal.

I. INTRODUCTORY.

§ 1. Definitions and Distinctions—Scope of Article.—Arbitration is the voluntary submission of a controversy,

by the parties interested, to one or more unofficial persons chosen by them, to investigate and determine the matter and render a decision concerning it. The persons to whom the dispute is submitted are called arbitrators, and their decision is the award.[1]

While the California code does not expressly define the term, it is generally understood that a submission to arbitration under the statute is but one mode of instituting a suit;[2] or rather, it is a substitute for proceedings in court.[3] The agreement submitting the matter to arbitration takes the place of the pleadings in an ordinary action; the arbitrators, upon the submission being filed with the clerk, become subject to a great extent to the control of the court, and their award is analogous to a judgment reported by a referee appointed to try a cause and report a judgment.[4]

Distinctions.—Arbitration is distinguished from a reference of a matter in litigation, in that a reference proceeds from the order of the court, either upon an agreement of the parties, or, in certain specific instances, upon the court's own motion,[5] whereas a submission to arbitration is primarily the voluntary act of the parties themselves.[6] Arbitration is also to be distinguished from the submission of a cause to a court for decision upon an agreed statement of facts, in that a submission in such case, though voluntary, is not to an unofficial person, but to the regularly constituted judicial arm of the government.[7] The distinction between arbitrations and appraisals is frequently nice and important, and it will be necessary to a clear understanding of the subject of arbitrations to consider it in some detail.[8]

1. See 2 Ruling Case Law, p. 351.
2. Williams v. Walton, 9 Cal. 142.
3. California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839; Fairchild v. Doten, 42 Cal. 125.
4. Fairchild v. Doten, 42 Cal. 125.
5. Code Civ. Proc., §§ 638, 639. See REFERENCES.
6. See infra, § 8, as to parties.
7. See SUBMISSION OF CONTROVERSY.
8. See infra, §§ 2–4.

Scope of article.—The present article deals with arbitrations only, though appraisals by third persons at the request of the parties, presenting as they do a close analogy to arbitrations and being governed largely by the same principles, are dealt with to a limited extent where they are unrelated proceedings and not mere incidents in the development of suits, special contracts or rights, or functions of government.[9]

§ 2. Existence of Controversy as Fixing Character of Proceeding.—There is said to be a clear distinction between an arbitration and an appraisement,[10] for to constitute an arbitration there must be a controversy.[11] This distinguishing feature of arbitrations is embodied in the section of the Code of Civil Procedure authorizing arbitrations, which provides that

"Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property."[12]

Notwithstanding the permissive clause in section 1281 of the Code of Civil Procedure, partitions of real property do not necessarily present such a controversy as makes them the subject of arbitration. And so, in the absence of any prior controversy, it has been held that an agreement between tenants in common for the partition and allotment in severalty of the common property, to be made by three disinterested parties, the determination of a majority of whom was to be binding on the cotenants, is not an agreement for arbitration. The parti-

9. For special varieties of appraisements, assessments and definitions of conceded rights, see EMINENT DOMAIN; INSURANCE; PARTITION; TAXATION, and similar specific titles.

10. Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982.

11. Gonzalez v. Gonzalez, 174 Cal. 588, 163 Pac. 993. And see infra, §§ 3, 4.

12. Code Civ. Proc., § 1281.

tioners in such a case do not act as arbitrators, but merely as agents for the cotenants.[13]

In a case where the rules of a stock exchange provide that all "differences, investigations of claims, or settlements of accounts," between members, or between them and nonmembers, shall be referred to committees of arbitration, it has been held that it is not necessary, in order to determine the delinquency of a member in not settling claims against him by this sort of arbitration, that there should be a dispute over the claims or accounts, the arbitration being merely the means by which the exchange becomes informed of the financial condition and conduct of its members.[14]

§ 3. Questions of Price and Value, Generally.—Under section 1281 of the Code of Civil Procedure,[15] it has been held that a question as to the value of real estate, or a disagreement as to its price, presents no subject matter for arbitration,[16] for while there might indeed be a controversy about such a matter, it could not be the subject of litigation, nor would the mere determination of value impose any obligation on either party or determine anything that could be enforced as a judgment. But though this is true of statutory arbitrations, it is competent at common law for persons to submit any question or matter of difference between them to the decision of third

13. Gonzalez v. Gonzalez, 174 Cal. 588, 163 Pac. 993. See COTENANCY.

In the case above cited Justice Sloss filed a dissenting opinion (Justice Shaw concurring therein) in which he said: "No doubt the existence of a controversy or dispute is a prerequisite to arbitration. But this does not mean that actual litigation between the parties shall have been commenced or threatened, or that they must have engaged in an acrimonious quarrel. It is enough if either of them asserts a right which requires judicial ascertainment and enforcement."

14. Rorke v. San Francisco Stock & Exchange Board, 99 Cal. 196, 33 Pac. 881. See infra, § 11, as to subject matter of arbitration in general.

15. See supra, § 2.

16. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817; Mahoney v. Spring Valley Water Works, 52 Cal. 159.

persons, whether it could be the subject of an action or not, and when they have done so the decision will be binding upon them.[17] So a provision in a contract for the purchase of property at a valuation to be determined by an appraisement by third parties, the reference being provided for long before any controversy arose, and the contract being based on a valuable consideration other than the mutual promise to submit to the decision of the third parties, such decision being merely one link in the chain of the claim, is not an agreement to submit to arbitration, and in making their valuation the valuers are not subject to the rules which govern arbitrations.[18]

§ 4. Nature of Investigation as a Determining Factor. Whether a proceeding is an arbitration or an appraisal may be determined at times by a reference to the nature of the investigation provided for. Thus it was said by Justice Shaw in a leading case:

"Submissions to determine value are of two kinds—first, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment; second, where they are to afford the parties a hearing, and an opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion. In cases of the first class, it is usually held that the agreement is not properly a submission to arbitration and is not subject to the rules which govern arbitrators, and that notice of the meetings of the valuers is not required. . . . The agreement for submission in the case at bar was of the second class above mentioned. It expressly provides that the arbitrators should fix a day to begin the taking of testimony and hear the respective parties. Cases of this class are usually held to be common-law arbitrations, and subject to the common-law rules on the subject."[19]

17. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817. See infra, § 7.

18. California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839.

19. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817 (citing

So a contract for the sale of timber at a valuation to be fixed by third persons, which expressly provides that neither of the parties shall offer any evidence before the valuers, but that the latter shall make their estimate from their own examination, does not contemplate a true arbitration, but merely an appraisement.[20] If parties expressly say in the submission agreement that the arbitrators are to determine the question upon their own skill and judgment without examining witnesses or hearing argument, there is nothing to prevent such agreement from being carried out; and if this can be expressed, it can in a proper case be implied.[1] It is well settled that the fact that the third persons to whom a matter is submitted for determination are styled "arbitrators" is not conclusive of the character of the proceeding before them, which may still be merely an appraisement.[2]

The voluntary submission by a member of a mutual benefit association of his claim for sick benefits to a tribunal of the association is in the nature of a submission to arbitration and the decision of the tribunal is in the nature of an award, and is equally conclusive.[3]

California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839, as establishing this doctrine in this state in respect to the first class named, and holding that the case at bar was of the second class mentioned in the text). See Stockton Combined Harvester & Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633, where a hearing was provided for, but the case seems nevertheless to have been regarded as one of appraisement. The point is not discussed in the opinion.

20. Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982.

1. Gonzalez v. Gonzalez, 174 Cal. 588, 163 Pac. 993 (a case of partition left to the determination of third persons without providing for a hearing); California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839 (a case of appraisement to fix purchase price of land).

2. Gonzalez v. Gonzalez, 174 Cal. 588, 163 Pac. 993; Foster v. Carr, 135 Cal. 83, 67 Pac. 43; Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982.

3. Robinson v. Templar Lodge, 97 Cal. 62, 31 Pac. 609.

§ 5. Survey of California Law.—The common law governing arbitrations was early recognized in California.[4] The legislature of the state, on April 29, 1851, passed "An Act to Regulate Proceedings in Civil Cases," etc.,[5] which became commonly known as the "Practice Act," and which contained, in sections 380–389, a complete scheme for arbitration, to be entered of record as a judicial proceeding, and to be backed by the process and authority, and carried out under the supervision of the courts. These provisions, with merely verbal changes, were afterward incorporated in the Code of Civil Procedure as title X, sections 1281–1290, respectively, and have thus stood, without substantial alteration, as the statute law of California on the subject since the time of their enactment. These provisions are supplemented by certain other enactments of a more general character, appearing both in the Code of Civil Procedure and the Civil Code. All statutory provisions pertaining to the subject of arbitration are hereafter noted at appropriate places in the course of this article. Notwithstanding the provisions for statutory arbitration, however, common-law arbitrations still occur, and are recognized by the California courts.[6]

Industrial arbitration.—In 1891 the legislature passed an act providing a scheme for the arbitration of industrial disputes. Under its provisions, the Governor each year appoints a board of three persons, one to represent employers, one to represent employees, and one to act as chairman who shall represent neither. The

4. Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313; Young v. Starkey, 1 Cal. 426.

5. Cal. Comp. Laws 1853, p. 588.

6. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817; Meloy v. Imperial Land Co., 163 Cal. 99, 124 Pac. 712; Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740; Draghicevich v. Vulicevich, 76 Cal. 378, 18 Pac. 406; Mahoney v. Spring Valley Water Works Co., 52 Cal. 159; Williams v. Walton, 9 Cal. 142; Heslep v. San Francisco, 4 Cal. 1; Boyd v. Bargogliotti, 12 Cal. App. 228, 107 Pac. 150. See infra, § 7, as to distinction between arbitration under statute and at common law.

board acts only on application of one of the parties to an industrial dispute. Its decisions are binding for six months, or until one party gives a sixty-day notice of intention not to be bound. No penalty is provided, however, for failure to obey the decision. Up to the time of this writing this statute has not been made the subject of judicial review.[7]

§ 6. Nature of Statutory Proceedings—Policy of the Law.—Arbitration under the statute, by which jurisdiction is taken from the courts and vested in designated persons, regardless of their calling or learning in the law, must, it has been said, find support in and be governed by the limitations and restrictions named in the statute.[8] The jurisdiction in such matters being special, it is only by a substantial compliance with all the requirements of the statute that it attaches.[9] But it is sufficient that there be a substantial compliance with the statute, the rule that proceedings in statutory arbitrations must be strictly construed as in derogation of the common law having no application in California, where the common-law rule as to the strict construction of statutes in derogation of it has been abrogated by the code.[10] The statutory provisions are in aid of the common-law remedy of arbitration, are a reaffirmance thereof, and do not alter its principles.[11]

The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays in-

7. Stats. 1891, p. 49 (Gen. Laws, Act 219, p. 56). See, generally, LABOR; MASTER AND SERVANT.

8. In re Abrams, 2 Cal. App. 237, 84 Pac. 363. And see cases and references, infra.

9. In re Joshua Hendy Machine Works, 9 Cal. App. 610, 99 Pac. 1110. See infra, §§ 9, 10, 12, as to compliance with statute as prerequisite to jurisdiction.

10. Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740. See STATUTES.

11. Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 162 Pac. 631; Peachey v. Ritchie, 4 Cal. 205; Tyson v. Wells, 2 Cal. 122; Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

cident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. The statutory provisions are designed to avoid useless proceedings and to make the practice simple and as speedy as would be consistent with justice. Since it is the policy of the law to favor arbitration, every reasonable intendment will be indulged to give effect to such proceedings.[12]

§ 7. Statutory and Common-law Arbitrations Distinguished.—As the statute provides a special mode of arbitration which, in matters of procedure is in contrast to the method of arbitration as existing at common law, it often becomes a matter of moment to determine the relation between the two systems, and to decide how far a proceeding attempted in one form which for any reason fails as such, may be given effect in the other.

A common-law submission is a very different thing from one under the statute. In the latter case, the proceeding is in court, the arbitrators are under its control, and the remedies of the parties much more simple, direct and efficient. The arbitrators constitute a part of the court, and if the court has no jurisdiction, they can have none, nor can they have common-law powers when appointed in the statutory mode.[13] At common law it is competent for persons to submit any question or matter of difference between them to the decision of third persons, whether it could be the subject of an action or not, though under the statute there must be such a controversy as might be the subject of a civil action.[14] Differences in requirements of procedure are noted in subsequent portions of this article.[15]

12. Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 Pac. 631 (citing authorities from many jurisdictions to like effect).

13. Williams v. Walton, 9 Cal. 142.

14. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

15. See infra, §§ 12, 19, 21, 23, 26, 40–47.

Whether a proceeding which fails as a statutory arbitration can be given effect as one at common law depends upon the intent of the parties. Thus it was held in an early case, where the parties had expressly stipulated for arbitration in the statutory mode, but through the accident of an unconstitutional statute had been led into a court which had no jurisdiction of arbitrations, and the proceedings were consequently void, that effect could not be given to them as a common-law arbitration, there being no inference that the parties intended to be bound at all unless the statutory mode was substantially pursued.[16] But where parties stipulate that the submission shall be taken to be a statutory one and may be entered as an order of court, yet the matters are not arbitrable under the statute, though they are so at common law, and the parties, ignoring the stipulation, do not cause the submission to be entered as an order of court, but proceed with the arbitration, introduce evidence, and go forward to an award without objection on that score, the proceedings are effective as a common-law arbitration, the parties being deemed to have waived the provisions of the statute as far as they may have been applicable to the proceedings. Since in such case the stipulation derives its force from the agreement and not from the statute as such, it is subject to waiver.[17] And so where a submission to arbitration, though stipulating that it shall be filed with the clerk and entered as an order of court, also prescribes a method of procedure for the arbitrators to follow so at variance with the statute, and in other respects departs so far from the statutory scheme, that it would be void thereunder, and the award made cannot, in consequence, be entered as a judgment as the statute provides, nevertheless the award may be good as a common-law award, and may be made the basis

16. Williams v. Walton, 9 Cal. 142.

17. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

of an action.[18] Where because of the absence of a controversy between the parties a proceeding does not constitute an arbitration, it will not be treated as a statutory arbitration merely because the arbitrators were sworn in accordance with the statute, there being no hearing as the statute contemplates and the award not being filed with the clerk.[19]

II. THE SUBMISSION.

§ 8. Parties.—At common law, every person legally capable of making a disposition or release of his right might make a submission of that right to arbitration.[20] And the same idea is expressed by the provision of the statute that "persons capable of contracting" may enter into an agreement to submit a controversy to arbitration.[1] It follows that the right to submit to arbitration often resolves itself into one relating to capacity to contract generally, or to the authority of the party to make a valid agreement in respect to the particular subject matter involved.[2]

It is clear that for want of capacity a minor cannot be bound by a stipulation to arbitrate.[3] As involving a question of authority, the rule is that a submission to arbitration is not within the powers of a general agent. An agent may have the most ample power to bind his principal by his own acts and determinations, but this of itself gives him no authority to delegate that power to others.[4] And a power of attorney "to bargain, contract, agree for purchase of lands," etc., "with full power of substitution," confers no authority to submit to arbitra-

18. Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740. Entry of award in statutory arbitration as judgment of court, see infra, §§ 40, 41.

19. Gonzalez v. Gonzalez, 174 Cal. 588, 163 Pac. 993.

20. 2 Ruling Case Law, p. 354.

1. Code Civ. Proc., § 1281.

2. See cases cited infra; and generally, see AGENCY; CONTRACTS.

3. Estate of Carpenter, 127 Cal. 582, 60 Pac. 162.

4. See AGENCY, vol. 1, p. 725.

tion a disagreement as to the price to be paid, the power of substitution only empowering the agent to substitute another in his place as agent or attorney, but not to substitute the judgment of another for his own judgment while he continues to act under the power. Even if he had such right, he could not bind his principals to abide by a price fixed, not by substitutes appointed by himself, but by other persons.[5]

The authority of a partner in respect to arbitrations is fixed by the Civil Code, which provides that

"A partner, as such, has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting. . . . 6. To submit a partnership claim to arbitration."[6]

But though a partner cannot bind his copartners by a submission of partnership matters to arbitration, such a submission will be good against himself, it being perfectly competent for him to resort to any mode to ascertain and settle a demand against himself.[7]

Under section 1281 of the Code of Civil Procedure, a municipal corporation, like an individual, has, through its regularly constituted officials, power to submit to arbitration any controversy which might be the subject of a civil action against it. Under this rule, such a corporation may agree to the submission to arbitration of claims for damages for a tort or a series of torts, as, for example, where such claims arise by reason of the construction by a municipality of a highway which was originally the subject of a condemnation suit. An agreement for such an arbitration cannot he held to create

5. Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 35 Pac. 1000 (where the submission was to arbitrament of five men, two chosen by each of the parties named, and one by the four so chosen).

6. Civ. Code, § 2430. See PARTNERSHIP.

7. Jones v. Bailey, 5 Cal. 345. See note, 4 A. L. R. 260, as to personal liability of partner who, in firm name, without authority, agrees to arbitrate.

any new or contractual obligation as between the municipality and the claimant beyond the obligation and agreement to submit to arbitration whatever claims for damages the claimant holds against the municipality. It in no respect alters the nature or character of the claims.[8]

§ 9. Jurisdiction of Statutory Proceedings.—The recitals in the submission, and the step to be taken with it, in order to bring the arbitration proceedings within the purview of the statute, are prescribed in the code as follows:

"It may be stipulated in the submission that it be entered as an order of the superior court, for which purpose it must be filed with the clerk of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission with the names of the parties, the names of the arbitrators, the date of the submission when filed, and the time limited by the submission, if any, within which the award must be made."[9]

The mere fact that statutory arbitration is possible does not confer on any court jurisdiction either of the subject matter in controversy or of the parties litigant. To confer this jurisdiction the requirements of the statute must be observed, namely, that the submission contain a stipulation that it may be filed as an order of court, that it be accordingly filed with the clerk, and that the clerk make the specified entries on his register of actions. The concurrence of these several conditions gives the court jurisdiction of the subject matter and the parties and power over the arbitrators, and the award may be made a judgment of the court as the statute provides.[10] Thus where the submission contains a stipula-

8. Cary v. Long, 181 Cal. 443, 184 Pac. 857. And see infra, § 20, to the effect that such submission does not change the nature of the claim.

9. Code Civ. Proc., § 1283 (in part).

10. Ryan v. Dougherty, 30 Cal. 218; Heslep v. City of San Francisco, 4 Cal. 1.

tion that judgment may be rendered in a certain court upon the award, but none that the submission itself shall be entered as a rule of court, and it clearly appears that the parties did not intend the proceedings to be conducted under a rule of court, but only that a judgment should be entered on the award, the court is without jurisdiction of the proceedings, and a judgment so entered is void.[11] But it is otherwise where an agreement for arbitration of matters in controversy is entered into while a suit concerning them is pending, and the agreement recites that it is made to avoid a suit in the courts. In such case, the fact that it is stipulated that the award shall be made an order of court, without stipulating that this shall also be done with the submission, does not avoid a judgment entered in the award, it being well settled that where arbitration is entered into pending a suit, it will be presumed that it was the intent of the parties that the submission should be entered as a rule of court, even when the arbitration agreement is silent upon the matter.[12]

The requirement of a stipulation in the submission "that it be entered as an order" is so strict, that it has been doubted if a stipulation that its submission shall be filed "and shall have the force and effect of an order" is sufficient, or if anything short of a stipulation unequivocally authorizing the entry by the clerk will confer upon him the authority to make the requisite entry of the submission in the register of actions.[13] Where the court in which a statutory submission is filed, pursuant to the stipulation contained therein, is one which has no jurisdiction over the subject of arbitrations and awards, and no authority to entertain the proceedings, the whole

11. Fairchild v. Doten, 42 Cal. 125.

12. Matter of Silliman, 159 Cal. 155, 113 Pac. 135 (citing authorities from other states on the point).

13. Pieratt v. Kennedy, 43 Cal. 393.

proceeding is totally void; the arbitrators, as a part of the court, being also without jurisdiction.[14]

§ 10. Jurisdiction as Depending on Clerk's Entry.— Where the necessary stipulation is embodied in the submission, and the submission itself is filed with the clerk, it then devolves upon that officer, in order to confer jurisdiction of the proceedings on the court, to make in his register of actions the entry as prescribed by the statute, which must include the names of the parties, the names of the arbitrators, the date of the submission when filed, and the time limited by the submission, if any, within which the award must be made.[15] The entry of this note by the clerk is jurisdictional, and without it the court acquires no jurisdiction over the subject matter or the parties. The clerk must, in the first place, be authorized by the stipulation to make note in his register, and, in the second place, he must, in fact, make it there— the mere authority without the act done is no more than the act done without the authority.[16] Both these must concur.[17]

But though the entry must be made, considerable latitude is allowed in the way of amendments and the correction of mistakes. Thus where the clerk omits the names of the arbitrators and the time limited for the award, but later adds these particulars before entry of judgment on the award, though after the award itself is filed the entries are sufficient to sustain the judgment, the word "thereupon," as used in the statute, not meaning "immediately," and the submission itself providing that it might be entered as an order of court "at any time."[18] And so the fact that the clerk enters both a sub-

14. Williams v. Walton, 9 Cal. 142.

15. Code Civ. Proc., § 1283 (see supra, § 9).

16. Kettleman v. Treadway, 65 Cal. 505, 14 Pac. 506; Pieratt v. Kennedy, 43 Cal. 393.

17. See supra, § 9.

18. California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 857.

mission to arbitration and the award, in the first instance, under the title of a pending action between the parties concerning the matters in controversy, if an irregularity, is one without injury, amounting to no more than a clerical misprision, and is corrected by full and complete entries later made under an appropriate title in an appropriate book.[19]

§ 11. Subjects of Arbitration.—All disputed matters, not involving illegal or criminal transactions or controversies, may be submitted to arbitration at common law.[20] The rule under the code is thus stated:

"Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property."[1]

The necessity that a controversy shall exist as a basis for arbitration under the statute, and the distinction in this respect between the statute and the common law, have already been considered.[2]

Under the section of the Practice Act corresponding to the above-quoted section of the Code of Civil Procedure, it was declared that parties had a right to submit the question relating to a partition of land to arbitration.[3] It should be noted, however, that this holding was made in a case where land had been owned and operated by a partnership, and where disagreements and controversies had arisen between the partners. The later and contrasting rule that a mere division of land between tenants in common presents no controversy which can be made the subject of arbitration has already been discussed.[4]

19. Matter of Silliman, 159 Cal. 155, 113 Pac. 135.

20. 2 Ruling Case Law, p. 358.

1. Code Civ. Proc., § 1281.

2. See supra, §§ 2, 3, 7.

3. Whitney v. Stone, 23 Cal. 275 (construing § 380, Practice Act).

4. See supra, § 2.

Notwithstanding a clause in the statute forbidding the arbitration of title to real property, it is said that one who is the admitted owner of a title in fee may contract to convey it, and a controversy concerning the performance or nonperformance of such a contract may be the subject of arbitration.[5] Nor does the statute change the general rule that where parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement.[6] Under the exception of the statute, an action for the recovery of a mining claim located on public lands by one alleging ownership in himself, against another who likewise claims ownership cannot be submitted to arbitration, a mining claim being regarded as a legal estate of freehold.[7]

An important distinction exists between matters and controversies of private concern, and those which are properly the subject of proceedings in rem. With respect to the latter, arbitration cannot be had, since such proceedings are binding on the whole world, and private individuals cannot, by their own stipulation, determine such a controversy. This rule has been applied to a contest over the validity of a will, which is held not to be an arbitrable matter, probate proceedings being in rem.[8] Among the more customary and important controversies which become the subject of arbitration are those arising out of building and construction contracts, losses under insurance policies, partnership disagreements, etc.[9]

5. Spencer v. Winselman, 42 Cal. 479 (under the Practice Act, citing §§ 380, 382).

6. Blair v. Wallace, 21 Cal. 317 (where the controversy grew out of a contract between the parties, and did not involve a question of title within the meaning of the Practice Act prohibiting its submission to arbitration).

7. Spencer v. Winselman, 42 Cal. 479.

8. Estate of Carpenter, 127 Cal. 582, 60 Pac. 162.

9. See generally, CONTRACTS; INSURANCE; PARTNERSHIP.

The rule in reference to an objection made on an appeal from a judgment of award on the ground that the award embraces matters not in fact submitted is considered in a subsequent section of this article.[10]

§ 12. **Form and Contents of Submission.**—At common law the agreement of submission to arbitration may be either verbal or in writing, except where title to land is involved, when it must be written to conform to the statute of frauds.[11] The Code of Civil Procedure, however, provides that

"The submission to arbitration must be in writing, and may be to one or more persons."[12]

A submission to arbitration will be liberally construed in order to sustain its validity.[13] And an agreement to submit matters to arbitration need not provide that the parties will abide by the award, that being implied from the fact of the submission itself.[14]

Void or invalid submissions.—A submission to arbitration under the statute, which stipulates that the award shall be final and conclusive and that neither side shall have the right to appeal, is void.[15] Where parties to an arbitration agreement, though stipulating that the submission shall be filed with the clerk and entered as an order of court, also stipulate that the arbitrators, without being sworn, may proceed to make an award "without set times or an appointed place for their proceedings," and that they may obtain such information touching the subject matter as they desire, and in such manner

10. See infra, § 48.

11. 2 Ruling Case Law, pp. 354, 359.

12. Code Civ. Proc., § 1282.

13. Jacob v. Ketcham, 37 Cal. 197.

14. Stockton Combined Harvester & Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633 (holding that such an agreement need not be alleged in a suit on the award); Robinson v. Templar Lodge, 97 Cal. 62, 31 Pac. 609.

15. In re Joshua Hendy Machine Works, 9 Cal. App. 610, 99 Pac. 1110.

as they deem best, "anything in the Code of Civil Procedure to the contrary notwithstanding," and that if the two arbitrators fail to agree they shall choose a third and the decision of the majority shall be binding, and that, after the decision is entered upon the judgment-book neither party will ask for "any reduction, exception, new trial, or appeal therefrom," but that such decision shall have all the force and effect of a final judgment of a court of last resort from which there shall be no appeal, and that the submission shall not be revoked by either party,—the submission departs so far from statutory mode of arbitration that it is void as such, and the award cannot be enforced as a judgment.[16]

A stipulation to submit the validity of a will to arbitration, made apparently on the basis that the will is valid but that the beneficiaries under it should pay contestants something to abandon their contest, under which the arbitrator is to determine what is a reasonable, just and equitable amount of the estate to be set over to the contestants, and is to get his information as he pleases without the parties having any right to submit any evidence to him, has been held to be too contradictory and absurd to be sustained.[17]

§ 13. Rule as to Naming of Arbitrators.—The submission must fix the number of arbitrators and provide the mode of their selection. Otherwise it will be void for uncertainty.[18] Thus under a submission to "disinterested and competent persons mutually agreed on by the parties," either party might withhold assent to the arbitrators suggested by the other, or one party might suggest one member and the other another. In neither

16. Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740.

17. Estate of Carpenter, 127 Cal. 582, 60 Pac. 162.

18. Greiss v. State Investment & Ins. Co., 98 Cal. 241, 33 Pac. 195 (a case of arbitration of a loss under a fire insurance policy); Case v. Manufacturers' Fire & M. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083 (also a case of fire insurance arbitration).

case could there be an arbitration by persons mutually agreed on.[19]

With reference to the specific question as to whether a submission to two persons named and to such other person as might be chosen by these two is valid as a statutory submission, the general rule is that, under the provision of the Code of Civil Procedure requiring the submission to be in writing,[20] and the further provision requiring the clerk to enter the names of the arbitrators in the register of actions,[1] all the arbitrators must be named in the submission, and a stipulation that two arbitrators named may choose a third not named, renders it void as a statutory submission.[2] A stipulation is too vague and indefinite to be allowed any validity where it does not fix the number of appraisers or provide a mode for selecting them, or the manner for making the award.[3] Other authority is to the effect, however, that where, under a contract, a dispute arises as to the amount of a loss, and it is provided therein that such dispute shall be adjusted by a mode of arbitration prescribed, the contract stipulating as to the number of appraisers and the exact mode of selecting them (although it does not name them), and provides also for the manner of making the award, no action can be maintained in the courts until the prescribed method has been pursued or some valid excuse exists for not pursuing it.[4] But it has been said

19. Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77.

20. Code Civ. Proc., § 1282.

1. Code Civ. Proc., § 1283.

2. Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740 (where the agreement named two arbitrators who, in case of disagreement, were empowered to choose a third, and where the submission was held void as a statutory submission, and citing to the same effect, Halloran v. Bray, 29 Ga. 422, and Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259). In re Joshua Hendy Machine Works, 9 Cal. App. 610, 99 Pac. 1110 (stating that it was the evident intention of the legislature in enacting sections 1283 and 1285 of the Code of Civil Procedure, that all the arbitrators must be named in the submission agreement).

3. Case v. Manufacturers' Fire & M. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083.

4. Adams v. South British etc. Ins. Co., 70 Cal. 198, 11 Pac. 627 (where the provision was for two

that the general rule first above expressed is not affected by this last stated rule, and apparently the rules are not regarded as conflicting.[5]

§ 14. Submission Pending Suit.—The submission of a cause of action to arbitration pending suit thereon operates as a discontinuance of the action and ousts the court of further jurisdiction over the cause.[6] It has been held under the Practice Act that a submission pending suit and not taken under the statute is a voluntary withdrawal of the case from the jurisdiction of the court, by which the court loses all control over the case and is left without authority to enter judgment on the award, except by consent of the parties.[7] This is the rule of the common law. But it has no application to the reference of a pending suit to referees, though made by consent of the parties, for this does not amount to an arbitration. And a consent to submit a matter to arbitration does not imply a consent that the party in whose favor the award is made may enter judgment upon it in court as a matter of right.[8] Of course, where arbitration is taken under the statute pending suit, the court does not lose jurisdiction, since the statutory procedure itself confers jurisdiction on the court, and the arbitration is carried on under its direction.[9]

appraisers to be mutually chosen by the parties, who, in case of disagreement, were to choose a third, a majority of whom could make a binding award); Old Saucelito Land etc. Co. v. Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232. See infra, § 15, as to submission as condition precedent to suit.

5. Case v. Manufacturers' Fire & M. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083.

6. Draghicevich v. Vulicevich, 76 Cal. 378, 18 Pac. 406; Gunter v. Sanchez, 1 Cal. 45.

7. Heslep v. City of San Francisco, 4 Cal. 1. But see Carsley v. Lindsay, 14 Cal. 390, holding that where a submission to arbitration is made an order of court under the Practice Act, the clerk may enter judgment on the award, in due time, without any further order of court, and in this respect overruling Heslep v. City of San Francisco, supra.

8. Gunter v. Sanchez, 1 Cal. 45.

9. See supra, § 6.

§ 15. Submission as Condition Precedent to Suit, Generally.—With reference to agreements to submit to arbitration, the authorities distinguish between two classes of cases. In one, the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts. In the other class they merely, by the same agreement which creates the liability and gives the right, qualify the right, by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained; and this is made a condition precedent, either in terms or by necessary implication.[10] Concerning the first class mentioned, the rule is stated that an agreement to refer a case to arbitration will not be regarded by the courts; but they will take jurisdiction and determine a dispute between the parties, notwithstanding such agreement.[11] In cases where arbitrations are permitted, the rule is that where the parties have agreed upon or authorized an arbiter to determine the existence of any fact which may be matter of dispute between them, such a contract is valid and binding upon the parties,[12] and the award thereunder is

10. North American Dredging Co. v. Outer Harbor Dock etc. Co., 178 Cal. 406, 173 Pac. 756; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54. See cases cited infra under the classes named.

11. Loup v. California S. R. R. Co., 63 Cal. 97 (holding that a stipulation in a contract to refer any disputes and differences which might arise between the parties as to the construction of the contracts, or the sufficiency of the performance of any of the work done under them, or the price to be paid to the arbiter for his arbitrament and final decision, is regarded as being against the policy of the law, and, for that reason, void); Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; American Pacific Const. Co. v. Modern Steel S. Co., 211 Fed. 849, 128 C. C. A. 375 (applying the rule to a contract providing that in case any differences of opinion should arise, they should be settled by arbitration, and holding that the case fell within the general phase of the rule that an agreement to refer a case to arbitration will not be permitted to oust the jurisdiction of the courts).

12. North American Dredging Co. v. Outer Harbor Dock etc. Co., 178 Cal. 406, 173 Pac. 756 (holding that the arbitration contemplated would

binding upon them, subject, of course, to the rule that it may be invalidated for fraud or mistake.[13] In such cases the stipulation to arbitrate embodied in the agreement creating the liability or giving the right is construed as a mere condition precedent to a right of action thereon,[14] and is binding upon the parties unless

interfere with the jurisdiction of the courts, and hence was not a condition precedent to suit).

13. See infra, §§ 35–37.

14. Coplew v. Durand, 153 Cal. 278, 16 L. R. A. (N. S.) 791, 95 Pac. 38 (applying the rule to a building contract providing that the work should be done to the satisfaction of the owner and the architect as evidenced by the latter's certificate); Davisson v. East Whittier Land etc. Co., 153 Cal. 81, 96 Pac. 88 (applying the rule to a construction contract and holding that arbitration or an unsuccessful attempt to secure it must be shown); Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903 (applying the rule to the case of an attorney rendering services to a client at the latter's valuation, and holding valuation a condition precedent, unless the client had repudiated the contract); Gray v. La Societe Francaise, etc., 131 Cal. 566, 63 Pac. 848 (applying the rule to a building contract providing that a dispute as to value of extra work should be arbitrated); Tally v. Parsons, 131 Cal. 516, 63 Pac. 833 (applying the rule to a building contract, and holding that a provision that loss, expense or damage to the owner should be audited by the architects, creates a condition precedent to the owner's suit on the contractor's bond); Scammon v. Denio, 72 Cal. 393, 14 Pac. 98 (applying rule to building contract requiring claim for extras to be submitted to arbitration and holding arbitration a prerequisite to action); Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863 (applying the rule to the provisions in an insurance policy for ascertaining the amount of loss by arbitration, and holding that the complaint in an action for the loss must specifically allege the award, or show that it was prevented by the fraudulent conduct of the insurer, and that a mere allegation that the plaintiff has duly kept and performed all the conditions of the policy is insufficient); Adams v. South British etc. Ins. Co., 70 Cal. 198, 11 Pac. 627 (applying the rule to provisions in a fire insurance policy for arbitration of differences touching any loss or damage); Old Saucelito Land etc. Co. v. Commercial Union Assn. Co., 66 Cal. 253, 5 Pac. 232 (applying the rule to a provision in an insurance policy); Cox v. McLaughlin, 63 Cal. 196 (applying the rule to a railroad construction contract which required estimates by the engineer as to the work done before payment of installments therefor); Loup v. California S. R. R. Co., 63 Cal. 97 (applying the rule to a railroad construction contract providing that installments should be paid on estimates of the engineer); Holmes v. Richet, 56 Cal. 307, 38 Am. St. Rep. 54 (applying the rule to a building

the condition is void,[15] or there has been a waiver thereof,[16] or unless the contract is rescinded by the party who claimed a breach, or he is entitled to a rescission.[17]

It will, of course, be noted that many of the cases holding that determination of value, loss, damage, etc., is a condition precedent to suit, deal in fact with appraisements and not with true arbitrations. Indeed, the distinguishing feature which makes a statutory arbitration possible, namely, the existence of a controversy which may be made the subject of a civil action operates in the main, equally well to define those cases in which the court, ignoring an agreement to arbitrate, will take jurisdiction of the cause.[18] To make arbitration a condition precedent to suit, it is not necessary that the contract should expressly provide that no suit shall be brought until arbitration has been had.[19] Nevertheless, courts will not construe an arbitration clause as ousting them of jurisdiction unless such construction is inevitable. And in the absence of express words or necessary implication from the language of the contract making arbitration a condition precedent, the arbitration clause will be

contract providing for the valuing of extra work by arbitrators).

As to the related subject of the certificate of an architect as a condition precedent to an action on a building contract, see ARCHITECTS, post.

15. See infra, § 16.

16. See infra, § 18.

17. North American Dredging Co. v. Outer Harbor Dock etc. Co., 178 Cal. 406, 173 Pac. 756 (holding that a condition precedent of this character is not binding upon the parties so as to have required the one who claimed a breach to have first sought recourse to arbitration, before either bringing an action upon the contract or working its rescission and commencing action upon a quantum meruit, if otherwise entitled to rescind it). See California Sugar etc. Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671, where it was held that the failure or refusal of a party without sufficient cause to pay installments due upon a contract justified a repudiation of the contract by the party not in default.

18. See supra, §§ 2–4, as to distinction between arbitration and appraisement; and see supra, § 11, as to subjects of arbitration.

19. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54.

construed as merely collateral to that creating the liability.[20]

§ 16. Necessity That Stipulation be Valid and Pertinent.—The stipulation which creates a condition precedent must be a valid one. Where it is so indefinite as to be void, it has no such effect.[1] It must also apply to the matter in hand. And so it has been held that where it applies only to loss or damage to personalty, it creates no condition precedent to a suit for the loss of a building.[2] Where no dispute calling for arbitration under the terms of the contract has arisen between the parties, there is, of course, no occasion for arbitration as a condition precedent to suit. And a complaint which fails to show an arbitrable dispute cannot be attacked for failure to allege a recourse to arbitration.[3] Thus, where, in an action on a fire insurance policy, the issue is whether the property was totally or only partially destroyed, a provision in the policy that damage to property not totally destroyed shall be arbitrated as to amount, has no application, and arbitration is not a condition precedent to suit. Otherwise, before the insured could sue for a total loss, he would be obliged to concede in advance, by entering into arbitration, that the loss was not total.[4] And if an insured underestimates his loss in his proofs thereof, and confines his claim against the insurer to the proper proportion of this estimate due under the policy, his refusal to arbitrate the question of the amount of loss as provided for in the policy would not bar his recovery of the amount so demanded. This is presumably on the theory that the

20. Oakdale Irr. Dist. v. Beard (Cal. App.), 190 Pac. 224. See infra, § 19, as to revocation of submission.

1. Greiss v. State Investment & Ins. Co., 98 Cal. 241, 33 Pac. 195.

2. Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77.

3. Farnum v. Phoenix Ins. Co., 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869; Burke v. Dittus, 8 Cal. App. 175, 96 Pac. 330.

4. Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77.

insurer could not very well dispute an underestimate of his liability, or was not injured, under the circumstances, by the refusal to arbitrate.[5] But it has been held that where the valuation of extra work under a building contract, by arbitration, is a condition precedent to suit, the fact that there is an accompanying dispute as to whether the work was in fact extra work, which latter dispute is for the court to decide, does not relieve the plaintiff from procuring arbitration, since if the court found it to be extra work, it could not find its value without arbitration having been had or attempted.[6]

§ 17. Condition Precedent as to Sureties.—The same distinction which governs the question of arbitration as a condition precedent to suits between principals, namely, whether the arbitration is to provide for the determination or merely the ascertainment of the cause of action, also applies to actions on the bonds of sureties. Thus, where a building contract makes an audit by the architects of loss, damage or expense to the owner a condition precedent to suit, the rule is that such a provision inures to the benefit of the sureties on the contractor's bond, and that the owner must procure such an audit before suing thereon. Nor would the fact that the contractor had repudiated and abandoned the contract relieve the owner from this obligation if the sureties have not repudiated the contract or waived any of its conditions. When the contractor abandons the contract, the very condition of loss arose which called for the audit, and the contractor could not repudiate the contract in this respect for his sureties, whatever effect his action might have on himself. Nor would the owner's discharge of the architects as careless, incompetent or dishonest affect the case, though if the architects had refused to

5. Case v. Manufacturers' Fire & M. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083.

6. Gray v. La Societe Francaise, etc., 131 Cal. 566, 63 Pac. 848.

act, or had acted fraudulently or corruptly, or through mistake, the owner by proving those facts could have relieved himself of the condition.[7] So, also, the death of the architects, or their absence and unknown whereabouts, would be a sufficient excuse for not obtaining their certificate.[8] But where a provision in a construction contract for arbitration of disputed rulings of the engineer in charge as to the fulfillment of the contract contains no language making such arbitration a condition precedent to suit, either expressly or by necessary implication, and the contractor's bond contains no provision for arbitration nor is so worded as to oust the courts of jurisdiction, arbitration is not a condition precedent to a suit on the bond.[9]

§ 18. Waiver of Condition.—A stipulation which makes arbitration a condition precedent to suit may be waived in many ways. Thus the acceptance of buildings erected under a contract providing for the arbitration of disputes is a waiver of the condition, and the contractor may sue without complying with it.[10] So, when the owner ignores the contractor's requests for arbitration, the effect is the same.[11] And where the architect whose duty it is to pass upon and make a certificate regarding the work fails or wrongfully refuses to do so, the provision is waived as far as the contractor is concerned.[12]

Where an insurer receives proofs of loss without objecting to the amount claimed, concerning which arbitration is provided for, but denies liability on other grounds, it

7: Tally v. Parsons, 131 Cal. 516, 63 Pac. 833.

8. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049. See ARCHITECTS.

9. Oakdale Irr. Dist. v. Beard (Cal. App.), 190 Pac. 224.

10. Burke v. Dittus, 8 Cal. App. 175, 96 Pac. 330.

11. Tubbs v. Delillo, 19 Cal. App. 612, 127 Pac. 515.

12. American-Hawaiian Engineering etc. Co. v. Butler, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280; Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79. See supra, § 17, as to effect as to contractor's sureties of architect's wrongful action or refusal to act. See, also, ARCHITECTS.

is a waiver of arbitration.[13] Where, in an insurance policy a company, as insurer, covenants to pay a loss sixty days after notice and proofs thereof have been received by it, and that differences touching any loss after proof thereof shall be arbitrated at the written request of either party, the failure of the insurer to demand arbitration until after sixty days from the furnishing of notice and proofs of loss is a waiver of the right to have such arbitration. In such a case arbitration is not a condition precedent to suit by the insured unless properly demanded by the insurer; nor will a refusal of the insured to agree to arbitration demanded after the sixty days have expired defeat his right of action.[14]

§ 19. **Revocation.**—At common law, either party to a submission could revoke it before an award had been made, but not afterward.[15] A distinction is, however, laid down by the Code of Civil Procedure between arbitrations taken under the statute and those at common law, the provision being that

"When so entered [that is, as an order of court] the submission cannot be revoked without the consent of both parties. . . . If the submission is not made an order of court it may be revoked at any time before the award is made."[16]

These provisions confer no right to revoke a submission after the award has been made. In this respect, they do not change the rule of the common law, their effect being to restrict rather than enlarge the right of revocation. Nor does the statute, in this respect, provide for two

13. Farnum v. Phoenix Ins. Co., 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869.

14. Winchester v. North British etc. Ins. Co., 160 Cal. 1, 35 L. R. A. (N. S.) 404, 116 Pac. 63; Case v. Manufacturers' Fire & M. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083.

15. California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 857.

16. Code Civ. Proc., § 1283.

kinds of arbitration.[17] Where an agreement submitting matters in controversy to arbitration contains no provision by which an order of court could be made upon it, and no action has ever been taken under it, it remains revocable under the statute.[18]

The general principle and the reasons therefor have been thus stated:

"There are two time-honored rules in relation to arbitration,—one that courts will not enforce an agreement to submit to arbitration, or, in other words, that it can be revoked; and the other that arbitrators must give notice of their sessions so as to afford the parties a right to be heard. These rules rest upon the same idea, viz., that an arbitration is a substitute for proceedings in court. It being considered against sound policy to allow parties to deprive themselves of their right of resort to the courts, agreements to that effect are not binding so long as they are executory; but if the parties choose to resort to other tribunals, such tribunals are held to the more important rules which govern courts in their proceedings."[19]

So, also, it is expressly provided by the Civil Code that an agreement to submit a controversy to arbitration cannot be specifically enforced.[20]

Damages to be recovered because of the revocation of a submission are fixed by the Code of Civil Procedure, which provides that

"If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration."[1]

§ 20. Particular Effects of Submission—*As to nature of claim.*—Though the submission to arbitration is itself

17. California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 857.

18. Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932.

19. California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839.

20. Civ. Code, § 3390 (subd. 3).

1. Code Civ. Proc., § 1290.

a contract, yet where the claims agreed to be arbitrated arise out of a tort, their tortious character is not changed or lost by the agreement to submit them to arbitration. The agreement, in such a case, does not create any new or contractual obligation between the parties beyond the obligation to arbitrate whatever claims may exist. Thus damages accruing against a municipality from condemnation proceedings which have been abandoned, being in the nature of claims sounding in tort, are not affected in this respect by being arbitrated, and hence a judgment entered on the award against the city remains a judgment for a tort, and its validity is not affected by the provision of the constitution forbidding a municipality to incur an indebtedness exceeding its revenue for the year except by an election, etc.[2]

As effecting waiver of formalities.—By joining in arbitration proceedings a party is deemed to waive preliminary formalities. And so, a provision in a policy of fire insurance, requiring the assured in case of loss to forthwith give notice thereof to the insurer, and produce a certificate of preliminary proof from a notary or magistrate, is waived if the insurer, after learning of the loss, makes no objection to the absence of the notice and preliminary proof, but joins in proceedings for determining the loss by arbitration, which proceedings were required by the policy to be taken after proof of the loss had been received in due form. And this result follows, although the policy contains a provision that no condition thereof shall be altered, annulled or waived, except by the written indorsement of the president or secretary of the insurer. And such a waiver is not prevented by a provision in the submission to arbitration, to the effect that the appointment "is without reference to any question or matters of difference within the terms and conditions of the insurance, and is not to be taken as any waiver

2. Cary v. Long (Cal.), 184 Pac. 857 (construing article XI, section 18, of the Constitution in this respect).

upon the part of the companies of the said conditions in their policies, in case they elect to avail themselves of them." Moreover, in such a case, the insurer cannot deny the authority of its agents to waive the provision of the policy as to notice and preliminary proof, when it adopts their acts in that regard, and relies on the award as a defense to an action to recover for the loss.[3]

When not "new or continuing contract" under section 360, Code of Civil Procedure.—It is a rule under the code that no acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of the statute of limitations unless the same is contained in some writing, signed by the party to be charged thereby.[4] Under this rule it has been held that a written agreement for the arbitration of a disputed indebtedness which recites in general terms the fact of indebtedness and contains a promise by the debtor to pay such amount as may be awarded, whether made before or after the statute of limitations had run against the demand, is not such a "new or continuing contract" as will toll the statute of limitations in an action brought on the original indebtedness after the statute had run. In such case, the acknowledgment is not direct and general, but qualified and conditional; and if it contains any cause of action, that cause must be based upon the contract which the instrument expressly states.[5]

Under arbitration provided for by section 2606, Political Code.—Under the provisions of section 2606 of the Political Code governing the termination of wharf and similar franchises by the state board of harbor commissioners with a view to the purchase of the wharf or other structure, and providing for arbitration of the pur-

3. Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863.

4. Code Civ. Proc., § 360. See LIMITATION OF ACTIONS.

5. Curtis v. City of Sacramento, 70 Cal. 412, 11 Pac. 748.

chase price in case it cannot be agreed on, and that upon the payment or tender of the price so fixed, the commissioners shall be entitled to the possession of the wharf, etc., arbitration to fix a disputed price is a condition precedent to possession, so that a city which has succeeded to the rights of the state harbor commissioners, and which has given notice of the termination of a wharf franchise, but has neglected to take steps for the required arbitration, may, upon suit by the owner be enjoined from trespassing on the wharf, the owner under the circumstances still retaining the right of possession, and the remedy by injunction being otherwise appropriate.[6]

III. ARBITRATORS AND THEIR PROCEEDINGS.

§ 21. Qualifications and Induction.—The general rule is that any person may be an arbitrator, no matter what his legal status; but if qualifications are stipulated in the submission, only those who fulfill them are eligible.[7]

It is provided in the code that

"Before acting, they [the arbitrators] must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding."[8]

Where a submission does not contemplate a true arbitration, but rather an appraisement merely, it is not necessary to the validity of the award that the arbitrators should have been sworn.[9] And where a party

6. Santa Fe Land Improvement Co. v. City of San Diego, 38 Cal. App. 380, 176 Pac. 377 (holding, however, that in this particular case injunction would not lie for other reasons).

7. 2 Ruling Case Law, p. 372.

8. Code Civ. Proc., § 1285.

9. California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839; Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982.

to a common-law arbitration, knowing that the arbitrators have not been sworn, proceeds with the hearing and enters into various stipulations without objection, and after the award is made begins negotiations to carry it out, also without objection on that ground, he will be deemed to have waived any right under the submission agreement to have the arbitrators sworn.[10]

Arbitrator not a judge pro tempore.—A statutory submission to arbitration does not constitute the arbitrator a judge pro tempore of the superior court under the constitutional provision that "a cause in the superior court may be tried by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, and sworn to try the cause, and the person so selected shall be empowered to act in such capacity in all further proceedings in any suit or proceedings tried before him until the final determination thereof," etc.[11]

§ 22. Proceedings in General.—The validity of an award of arbitrators depends not only upon their due and proper appointment, but upon the regularity of their proceedings.[12] Accordingly, it is a rule that if these proceedings are had ex parte, and without notice to the parties of the hearing, their award is invalid and void.[13] In respect to the proceedings of arbitrators, the code makes the following provisions:

"All the arbitrators must meet and act together during the investigation, but when met, a majority may determine any question."[14]

10. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

11. Const., art. VI, § 8 (in part); Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 162 Pac. 631. See supra, § 13, as to selection of arbitrators in submission agreement.

12. Curtis v. City of Sacramento, 64 Cal. 102, 28 Pac. 108.

13. See infra, § 23.

14. Code Civ. Proc., § 1285.

And, to similar effect:

"When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all."[15]

And it is given as one of the grounds for vacating the award

"That the arbitrators . . . acted improperly, in a manner by which the rights of the parties were prejudiced."[16]

Where a submission gives the arbitrators power to appoint an umpire, they have the right to select him before as well as after the investigation has commenced, though the articles of submission contain a clause providing for such selection in the event of a disagreement between the arbitrators. Indeed, it is the better practice to first select the umpire, so that he can hear the evidence from the witnesses.[17]

The distinction between arbitrations and appraisements is pertinent here, for where a proceeding is a mere appraisement and not a true submission to arbitration, it is not subject to the strict rules which govern arbitrators.[18] Thus where appraisers in a contract for the sale of timber, in order to make a valuation thereof, go upon the land together, but separately examine and value portions of the timber, and then meet and compare notes and finally concur in the valuation of the whole, it cannot be objected that the valuation of the timber was not their joint labor and judgment.[19]

Arbitrators are clothed with much of the dignity and attributes of courts, and must exercise their authority

15. Code Civ. Proc., § 1053. See infra, § 26, as to necessity of joint award.

16. Code Civ. Proc., § 1287 (in part). See infra, §§ 44–47, as to vacating award in general.

17. Dudley v. Thomas, 23 Cal. 365.

18. California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839.

19. Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982 (appraisers held not to be "arbitrators" though so styled in the contract).

with the utmost propriety and caution until they have completely executed their trust. But mere partitioners, appointed by the agreement of cotenants to partition real property, do not exercise judicial functions. Hence, the fact that they were entertained by one cotenant and discussed the partition with him, would not be sufficient to vitiate their award, where they were not unduly influenced thereby.[20] It has been held that the fact that arbitrators consulted with a third person who was not an arbitrator, but afterward acted on their own judgment in making their determination, will not vitiate the award.[1]

§ 23. Notice of Hearing.—Parties to an arbitration must have notice of the meeting of the arbitrators and an opportunity to be heard.[2] The code contemplates the giving of such notice, since it provides that

"Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties and to make an award thereon."[3]

An award made upon ex parte proceedings, without notice of the time and place of hearing given to the parties, and an opportunity accorded them to be heard, is invalid. The right to such notice is implied in the submission agreement, unless it is expressly waived by its terms. An award made without notice of a hearing and opportunity to he heard would be violative of that portion of the bill of rights, which declares that no person shall be deprived of life, liberty or property without due process of law.[4] But where a party to an arbitra-

20. Gonzalez v. Gonzalez, 174 Cal. 588, 163 Pac. 993.

1. Simons v. Mills, 80 Cal. 118, 22 Pac. 25.

2. California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839; Curtis v. City of Sacramento, 64 Cal. 102, 28 Pac. 108.

3. Code Civ. Proc., § 1284.

4. Curtis v. City of Sacramento, 64 Cal. 102, 28 Pac. 108. See, also, supra, § 19.

tion, though not given notice of the time and place of meeting of the arbitrators, is nevertheless present in person and instructs the arbitrators to proceed, and is thereafter represented throughout the proceedings by his agent duly authorized for that purpose, and afterward takes possession of property given him under the award, the facts constitute a waiver by him of such notice.[5]

In a case where the proceeding is not a true arbitration, but merely an appraisement, the rule is that notice and opportunity to be heard are not required, unless by express provision in, or reasonable implication from, the submission.[6]

§ 24. Reception of Evidence.—The statute does not expressly provide that persons making statements before arbitrators must be sworn, though it authorizes arbitrators to administer oaths.[7] Even if the failure of arbitrators to swear witnesses testifying before them can be regarded as misconduct, still it cannot avail a party who did not ask to have them sworn, or object to their not being sworn, or except to their being allowed to make statements not under oath. Though it might be improper for arbitrators to refuse a party's request that the witnesses be sworn, it would be preposterous to hold an award void because they were not sworn, after all the parties had agreed, either expressly or by failure to object, that they need not be.[8]

The code provides that

"Arbitrators have power . . . to hear the allegations and evidence of the parties and to make an award thereon."[9]

5. Foster v. Carr, 135 Cal. 83, 67 Pac. 43.

6. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817; Foster v. Carr, 135 Cal. 83, 67 Pac. 43; California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839; Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982.

7. Code Civ. Proc., § 1284.

8. Matter of Silliman, 159 Cal. 155, 113 Pac. 135; In re Connor, 128 Cal. 279, 60 Pac. 862.

9. Code Civ. Proc., § 1284 (in part).

And it is given as a ground for vacating the award:

"That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence."[10]

The parties to an arbitration have a right to introduce evidence in support of their claims, and for the arbitrators to decide a matter before the evidence concerning it and the matter itself have been submitted to them for decision, is a plain denial of this right.[11] But the parties must exercise due diligence to procure evidence upon which to base a just award.[12] Where arbitrators are required to make an award by a certain time, a request by one party when the arbitrators have met to make up their report, and in the absence of the other party, that the cause be reopened for further testimony, is properly refused, where, to grant it, would make it impossible to return the award within the time stipulated.[13]

Admissions made for the purpose of submitting to arbitration matters of difference between certain parties, in order to dispense with proof of the facts admitted, cannot be received in evidence in a collateral action between the same parties.[14]

§ 25. Compensation.—Generally speaking, arbitrators may maintain suit for their compensation, and their right of action is several and not joint. Primarily, therefore, it seems that the parties to the agreement of submission should be joined as defendants.[15] Each party to an arbitration is liable to the arbitrators for the full

10. Code Civ. Proc., § 1287 (subd. 2). See infra, §§ 44–47, as to vacating award in general.

11. Meloy v. Imperial Land Co., 163 Cal. 99, 124 Pac. 712.

12. Montiflori v. Engels, 3 Cal. 431.

13. Matter of Silliman, 159 Cal. 155, 113 Pac. 135.

14. Duff v. Duff, 71 Cal. 513, 12 Pac. 570. As to admissions generally, see EVIDENCE.

15. See 2 Ruling Case Law, p. 377.

amount of their services; and they are under no obligation to deliver their award to the parties until paid for their services. A promise by a party to an arbitrator to see him paid in case he will deliver his award is an undertaking to pay a reasonable compensation, and is supported by a valid consideration. And it has been held where the parties to the arbitration have agreed that the loser shall pay the arbitrator's charges, and the winner afterward promises the arbitrator, who is ignorant of the agreement, that he will see him paid if he deliver his award, such a promise would seem to be an original undertaking such as need not be in writing under the statute of frauds. Under such circumstances, both parties remain equally bound to the arbitrator for his compensation, notwithstanding the secret agreement between them, and hence the winner's promise is merely to pay a debt which he already owes on his own account, and is not a promise to answer for the debt of another. But the agreement gives the winner the right to recover from the loser the amount paid for the award.[16]

IV. THE AWARD.

§ 26. In General.—There is no technical language in which an award must be clothed. At common law it might even be by parol, unless the title to land was involved, when, to avoid the statute of frauds, it was necessary that it be written. Whether all the arbitrators must join in the award depends, at common law, on the terms of the submission.[17] Under the code, however, the rule is that

"The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties."[18]

16. Young v. Starkey, 1 Cal. 426.

17. 2 Ruling Case Law, pp. 382, 383.

18. Code Civ. Proc., § 1286. See supra, § 25, as to right of arbitrator to withhold delivery of award until

Arbitrators are not bound to award on principles of dry law, but may decide on the principles of equity and good conscience, and make their award ex aequo et bono. And they are not required to find facts nor to give reasons for their award.[19] Awards are to be liberally construed, in order to sustain their validity.[20]

Time for making award.—Where the submission has been entered as an order of court, the code provides that

"The arbitrators may be compelled by the court to make an award."[1]

But this may be done only where the submission does not, as it need not, limit the time within which the award must be made. In such case the court may compel an award where the delay in making it is unreasonable. But where the time for making the award is limited by the contract of the parties, the court cannot, after such period has expired, compel an award, as it could have no jurisdiction to extend or add to the original agreement.[2] When the time within which the award is to be made is fixed by the submission, it must be made within that time, and an award made afterward is void, as made without jurisdiction in the arbitrators.[3] But it would seem that the parties might stipulate for an extension of time to the arbitrators within which to make the award.[4] An undated award will be presumed to have been made

paid for his services; and infra, § 47, as to waiver of failure to sign award.

19. In re Connor, 128 Cal. 279, 60 Pac. 862; Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313. See infra, § 29, to the point that an award need not recite that one party shall "have and recover" of the other.

20. Jacob v. Ketcham, 37 Cal. 197; Pierson v. Norman, 2 Cal. 599.

1. Code Civ. Proc., § 1283 (in part).

2. In re Abrams, 2 Cal. App. 237, 84 Pac. 363.

3. Ryan v. Dougherty, 30 Cal. 218; In re Abrams, 2 Cal. App. 237, 84 Pac. 363.

4. Ryan v. Dougherty, 30 Cal. 218.

on the day it is filed with the clerk of the court pursuant to the term of the submission.[5]

Objection to an appraisement of personal property, made under a contract for its sale, which does not provide for a technical arbitration, that the report of the appraisers was not made within the time provided in the contract, is without merit, where time was not made of the essence, and the delay was due to the refusal to act of a person named as appraiser by one of the parties.[6]

§ 27. Conclusiveness.—An award rendered upon a fair arbitration of a matter in dispute is conclusive of the rights of the parties. Especially is this true where the award has been concurred in for a long time by them.[7] And the parties are presumed to know that this will be the effect of the award.[8]

Where an award in arbitration proceedings under the statute has been duly entered as an order of court as provided by the code,[9] and a motion to vacate it for alleged misconduct and bad faith of the arbitrators and for fraud and excess in amount has been overruled, and an appeal from the order overruling the motion has been taken and afterward dismissed, the award becomes the final judgment of the court, and cannot be thereafter collaterally attacked by one of the parties for fraud, misconduct, error or excess.[10] But though an award is the judgment of a tribunal selected by the parties, greater effect cannot be given to it than is given by law to the judgment of an inferior court.[11]

5. In re Abrams, 2 Cal. App. 237, 84 Pac. 363.

6. Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982.

7. Jarvis v. Fountain Water Co., 5 Cal. 179. And cases cited infra.

8. Montiflori v. Engels, 3 Cal. 431.

9. Code Civ. Proc., § 1286.

10. Cary v. Long, 181 Cal. 443, 184 Pac. 857.

11. Curtis v. City of Sacramento, 64 Cal. 102, 28 Pac. 108.

An award of arbitrators fixing a boundary between two Mexican land grants of undelimited tracts lying within specified exterior limits, though effectual between the par-

In order that an award shall be binding, it is not necessary that the submission contain an express covenant to that effect, as the fact of submission implies such an agreement.[12] Thus, where a member of a mutual benefit association, without being constrained thereto by his contract of membership, voluntarily submits his claim for sick benefits to a tribunal of the association, the denial of it by the tribunal is binding on him, although he did not expressly agree to be bound thereby.[13] But to be binding the decision of the arbitrator must be a real award made in the arbitration proceedings. The testimony of a person once agreed upon as an arbitrator but who never acted as such, when called as a witness in a suit between the parties concerning the matter in controversy, in reference to matters which he might have adjudged, is not conclusive, but is entitled only to the weight to be given that of any other witness similarly informed.[14]

§ 28. Conclusiveness of Appraisals, etc.—The conclusive character of an award is extended to appraisements of value. And where an award as to values is to be made after hearing and upon a judicial investigation and consideration of evidence, its conclusive character is beyond dispute.[15] Nothing is better settled than the rule that when the parties agree that the performance or nonperformance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding in the absence of fraud or mistake.[16] The same

ties holding respective titles thereto until the action of the United States government shall define the boundaries of the grants, cannot bind the government or control the effect of its patent which disregards the award. Waterman v. Smith, 13 Cal. 373.

12. Stockton Combined Harvester & Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

13. Robinson v. Templar Lodge, 97 Cal. 62, 31 Pac. 609.

14. McFadden v. O'Donnell, 18 Cal. 160.

15. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

16. California Sugar etc. Agency

conclusiveness attaches to various other determinations of fact by persons agreed on, such as those of architects or engineers as to the quality or progress of work done under construction contracts providing for such adjudications, etc.[17] But such a determination is not conclusive between the parties as to collateral matters arising under the contract and not connected with the right to terminate it for the reasons found in the arbiter's certificate. The sole function of such a certificate is to serve as a basis for a notice terminating the contract. Upon any matter dependent on or arising out of that proceeding, it would be conclusive. But, at most, it could be no more than prima facie evidence in any collateral matter.[18] Applying the rule above stated, it has been held, where parties stipulate that notes shall be payable when the title to certain land is made good to the satisfaction of certain named attorneys, and the attorneys in good faith reject the title, that this decision is binding on the parties even though the court find that the title is in fact good, for the court would have no right to substitute its opinion for that of the arbitrators, whose conclusion, in the absence of fraud, is conclusive and binding, and cannot be subject to the revisory power of the courts without doing violence to the contract which the parties have made for themselves.[19] An agreement to buy at a price to be fixed by arbitration is not complete until the award has been made. It may then be enforced in the same manner as if the parties had agreed upon the price and

v. Penoyar, 167 Cal. 274, 139 Pac. 671; American-Hawaiian Eng. & Const. Co. v. Butler, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280; City Street Imp. Co. v. Marysville, 155 Cal. 419, 23 L. R. A. (N. S.) 317, 101 Pac. 308; Moore v. Kerr, 65 Cal. 519, 4 Pac. 542. See infra, §§ 35–37, as to mistake and fraud.

17. City Street Imp. Co. v. Marysville, 155 Cal. 419, 23 L. R. A. (N. S.) 317, 101 Pac. 308; American-Hawaiian Eng. & Const. Co. v. Butler, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280; Moore v. Kerr, 65 Cal. 519, 4 Pac. 542. See, also, ARCHITECTS, post.

18. American-Hawaiian Eng. & Const. Co. v. Butler, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280.

19. Church v. Shanklin, 95 Cal. 626, 17 L. R. A. 207, 30 Pac. 789.

inserted it in the agreement themselves. It has been held that such an award is competent evidence of value in an action to enforce the agreement, as a declaration by authorized agents of the parties as to a matter within the scope of their authority and made in the performance of their delegated duty, and is sufficient to support a finding.[20]

§ 29. Certainty and Finality—Valid Awards.—The object of submitting to arbitration differences between the parties which are within the scope of legal arbitration, is to obviate or put an end to litigation, and it is essential to the validity of an award that it should be final,—that it should finally determine the matters submitted, leaving nothing to be done but to execute and carry out the terms of the award. This is true both under the common law and under the code.[1] When accounts are submitted to arbitration, the arbitrators are required to make a settlement of them, that is, to ascertain and strike a balance between the accounts and declare the amount found due from one party to the other.[2] In fact, the court may, on motion, vacate the award if it is indefinite, or cannot be performed.[3] Tested by the rules above expressed, it has been held that an award of matters in dispute between partners, which finds that one partner is accountable to the partnership in a named sum, and that the other partner is likewise accountable in a named sum, and that the one is entitled to recover of the other one-half of the difference between the sums named, and that the partnership should be dissolved from the date of the award, is not void for uncertainty, though the process by

20. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

1. Pierson v. Norman, 2 Cal. 599; Boyd v. Bargagliotti, 12 Cal. App. 228, 107 Pac. 150. See infra, § 44, as to necessity that uncertainty appear on face of award; and infra, § 45, as to award good in part and bad in part.

2. Jacob v. Ketcham, 37 Cal. 197; Alexander v. McNear, 28 Fed. 403, 12 Sawy. 82.

3. See Code Civ. Proc., § 1287.

which the result is reached is not detailed.[4] And an award determining differences arising out of a partnership, which contains an itemized statement of the partnership accounts showing a balance in favor of one partner, to secure the payment of which it is found that he has a lien by pledge upon the other partner's interest in a specified portion of the partnership property, and containing a complete schedule of the partnership property in which it is determined that the partners are equally interested subject to such lien, is not open to objection as indefinite, though it does not provide that either partner shall have or recover any sum or anything from the other, nor that any disposition, sale or division of the existing partnership property shall be made, it not appearing that any controversy as to the disposition of the property existed or was submitted to the arbitrators, and the finding that the one owed the other a certain sum implying that he should pay it.[5] An award which states that there is a balance due from one party to the other of a named sum is not indefinite.[6]

§ 30. Invalid Awards.—An award which renders a further inquiry necessary to ascertain a sum of money to be paid or some act to be done is void;[7] for it is clear that an award which does not adjudge the amount to be paid, nor give data from which it can be ascertained, cannot form the basis of an action. Such an award becomes merely the cause of a new controversy.[8] Accordingly, where a contract for the construction of a building requires the owner to pay a specified sum, subject to deductions for moneys and provisions furnished employees, an award that he pay "for said building agreeable to

4. Carsley v. Lindsay, 14 Cal. 390.

5. Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92.

6. In re Connor, 128 Cal. 279, 60 Pac. 862. See infra, § 30, as to invalid awards.

7. Porter v. Scott, 7 Cal. 312. And see cases cited infra.

8. Alexander v. McNear, 28 Fed. 403, 12 Sawy. 82.

contract in writing," without ascertaining the sum due, is void for uncertainty.[9] And where an award of differences growing out of a bridge construction contract points out the particulars in which the structure fails to meet specifications, and finds that the owner has been injured, but refuses to assess damages, provided the contractor without delay completes the bridge and devotes five days' time of a good mechanic to the approaches, and recites that if the contractor does so, it is the judgment of the arbitrators that he should be entitled to the compensation provided for in the original contract, is not a final award, as it still leaves the question open as to whether subsequent work undertaken by the contractor would prove a compliance with the award, and hence is invalid.[10] An award that one party and his partner are entitled to a specified credit on their account with the other party is not a final award upon the matters submitted, within the rule that, to be valid, an award must be complete and decisive, so as to avoid further litigation; and it has been held that such an award is not admissible in evidence, in a subsequent action between the parties.[11]

§ 31. Inadequacy, Generally—Ita Quod Doctrine Abolished.—"The rule is general," said Justice Field, in a leading case, "that arbitrators must pass upon all matters submitted or their award will be invalid. If several matters are specified in the submission and the award does not disclose that each is determined, it is defective on its face and can be set aside on motion. But if the submission is general, of all the matters in controversy between the parties, without specification, it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon or the award will be void in toto, and will be set aside upon a proper

9. Pierson v. Norman, 2 Cal. 599.
10. Boyd v. Bargagliotti, 12 Cal. App. 228, 107 Pac. 150.
11. Jacob v. Ketcham, 37 Cal. 197.

showing of the omission." In further discussing the rule it was said that in determining the duty of arbitrators to pass upon all matters laid before them or brought to their notice under a general submission, importance was formerly attached to the so-called ita quod clause, namely, "so that the award be made of the premises," by a certain day. It was formerly held that where the ita quod clause was present, the arbitrators must pass on all matters brought before them or to their notice, but where it was absent, an award covering a portion of the matters only was to be considered good. But the presence or absence of this formal clause is not now regarded as of any moment, and the duty of arbitrators under a general submission to pass upon all matters laid before them or of which they have notice is determined by a general construction of the language of the submission. And so, the language may be deemed to require a decision as to all matters submitted to the arbitrators, though the ita quod clause be wanting in set terms.[12]

§ 32. Award as Coextensive With the Submission.—The rule that arbitrators must pass upon all matters submitted is embodied in that provision of the code which empowers the court to vacate, on motion, an award where "they [the arbitrators] refused or improperly omitted to consider a part of the matters submitted to them."[13] This provision refers to the matters as set forth in the agreement for submission, and does not include such omissions as the refusal to hear pertinent evidence,[14] which is covered by another clause of the same section.[15]

The rule that the arbitrators must pass upon all matters submitted to them is but part of the more general rule

12. Muldrow v. Norris, 12 Cal. 331. See infra, § 49, as to setting aside portion of award on appeal as rendering it incomplete.

13. Code Civ. Proc., § 1287 (in part).

14. Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004. Vacating award in general, see infra, §§ 44–47.

15. Code Civ. Proc., § 1287, subd. 2.

that the award must be coextensive with the submission. Even without the ita quod clause, it is established that all matters submitted must be passed upon by the arbitrators, if brought to their attention, unless the language of the submission clearly indicates a contrary intent.[16] And if it appears upon the face of the award that the arbitrators have not disposed of the whole matter, but have left a part open, it is void and will be set aside.[17] A useless and invalid determination upon an item properly presented within the general terms of the submission is, on principle, as fatal to the entire action of the arbitrators as an omission, intentional or unintentional, to notice the item at all.[18] But where an award seems on its face to embrace the entire subject submitted, and there is nothing in the record to the contrary, the fact that there were other items or pieces of property not specifically acted upon, but which might have been included, is no cause for impeaching the award. To make such omission available as a ground for vacating the award, it must be shown that the facts were brought before the arbitrator and that he refused to pass upon them. It will not do for a party to withhold his proof from the arbitrators, when he has a fair opportunity to present it, and then claim the right to set aside the award because the arbitrator did not act upon or in reference to it.[19] A finding—in this case by a referee to whom a cause was submitted by agreement—that he was unable for lack of evidence to ascertain the value of a certain property interest has been held equivalent to a finding that it had no value, and hence the award was not invalid for incompleteness.[20]

16. White v. Arthur, 59 Cal. 33. See infra, § 45, as to award good in part and bad in part.

17. Porter v. Scott, 7 Cal. 312.

18. Muldrow v. Norris, 12 Cal. 331.

19. Carsley v. Lindsay, 14 Cal. 390.

20. Montiflori v. Engels, 3 Cal. 431.

§ 33. Rule Where Powers of Arbitrators Have Been Exceeded—In General.—While an award must be coextensive with the submission, and must embrace not only all matters properly submitted, it must not extend beyond them. This rule is embodied in the code provision that the court, on motion, may vacate the award where "the arbitrators exceeded their powers in making their award."[1] The rule, it is said, seems thoroughly established by the precedents, and is certainly consonant with principle, that an award which goes clearly beyond the issues limited by the submission, and is therefore in excess of the power conferred on the arbitrators, is invalid as a whole, when the matter ultra vires cannot be separated without violating the plain intention of the parties.[2] Where, however, an agreement of submission recited a sale and resale of certain lands, out of which transaction disputes and misunderstandings had arisen, and the submission was of "all and every matter of dispute arising from or growing out of the transaction aforesaid," an award that one party receive from the other a certain amount of money and convey to him the lands mentioned has been held prima facie authorized by the submission.[3] As an instance of an arbitration invalid under the rule, it has been held that a submission "with regard to the exchange of lands on K. creek," and to "the matter of the construction of a line fence to divide the lands of the parties," does not authorize an award requiring the conveyance of tracts of land from one party to the other on payment of prices fixed therein; and as the award is an entirety, it is void in toto.[4]

1. Code Civ. Proc., § 1287 (in part).

2. White v. Arthur, 59 Cal. 33. See infra, § 34, for application of the rule to partnership arbitrations; infra, § 39, as to award of costs though not mentioned in submission; infra, § 45, as to award good in part and bad in part; and infra, § 48, as to showing required where award is objected to on the ground that it embraces matters not in fact submitted.

3. Bean v. Wallace, 21 Cal. 317.

4. White v. Arthur, 59 Cal. 33.

§ 34. Rule Applied to Partnership Arbitrations.—The arbitration of differences arising out of the partnership relation must, to constitute a valid award, keep within the scope of the submission. Thus, where the articles of copartnership are made a part of the submission, which further provides that the arbitrators shall decide upon the amounts of money each party may owe the other at the date of the submission, "arising or becoming due upon any of the transactions, acts, or omissions referred to in the preambles to this submission, and having found such amounts shall therefrom arrive at their award," etc., and the submission further declares that the reference is made "in order that all matters in difference now existing" in reference to the partnership business and "all rights of action of each of said parties against the other arising out of said . . . business, may be conclusively settled," the arbitrators have authority to determine what amounts are due to each party out of uncollected assets of the partnership. It has been held that the fact that the award describes such assets as "bills receivable" due one party as trustee for the partnership is not ground for objection, in that it gives such party authority to collect the claims, where it appears he already had that power under the partnership agreement.[5] Under a submission to arbitration of "partnership matters and accounts," the arbitrators are empowered to decide a difference between the partners as to whether certain property is that of the partnership or belongs to one of them as an individual, especially so where it is necessary to make such decision in order to adjust the partnership accounts.[6] In a case where arbitrators were appointed to assess the value of property belonging to a dairy partnership, and were empowered "to determine and award the value of all feed now on hand," such as "hay, grain, oil cake, etc.," and where they construed this as including certain

5. Simons v. Mills, 80 Cal. 118, 22 Pac. 25.

6. Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92.

growing beets and carrots, which construction was acquiesced in by the complaining party and his agent who represented him at the hearing and who afterward took possession under the award, it has been held that the finding of the value of the beets and carrots in the award must be treated as valid and binding.[7]

§ 35. Impeachment for Mistake, Generally.—An award cannot be impeached because contrary to law and evidence, either at common law or under the statute.[8] It was stated in an early case that courts of equity, in the absence of statute, will set aside awards for mistake or accident, and it makes no difference whether the mistake be one of fact or law.[9] But the "mistake" which will justify an impeachment of the decision of arbitrators is not a mere error of judgment. It is the kind of a mistake which amounts to fraud, that is, such mistake as has prevented a fair exercise of judgment upon the question to be determined.[10]

Under a general submission, arbitrators have power to decide both upon the law and facts, and are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their

7. Foster v. Carr, 135 Cal. 83, 67 Pac. 43.

8. Carsley v. Lindsay, 14 Cal. 390 (stating that an impeachment on this ground was not admissible at common law, and if it were, the Practice Act, § 385 et seq., prescribes other grounds as those upon which alone an award can be vacated).

9. Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

10. California Sugar etc. Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671 (contract to sell lumber); American-Hawaiian Eng. etc. Co. v. Butler, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280 (building contract). See Dingley v. Greene, 54 Cal. 333, where the rule is stated in reference to conclusiveness of the certificate of an architect; Moore v. Kerr, 65 Cal. 519, 4 Pac. 542, relating to acceptance of a building contract by an authorized agent; and City Street Improvement Co. v. Marysville, 155 Cal. 419, 23 L. R. A. (N. S.) 317, 101 Pac. 308, where the certificate of a city engineer as to work done for a municipality was, in the absence of a showing of any fraud on the part of the contractors, held conclusive.

award ex aequo et bono. Under this rule a mere mistake of law cannot be taken advantage of to avoid the award. But if the arbitrators mean to decide according to the law, and make a mistake concerning it, the courts will set their award aside. A distinction seems to exist in this respect between general and special awards. In the case of a general finding, courts will not inquire into mistakes by evidence outside the record, but where any point is spread upon the record, and the mistake of the arbitrators regarding the law is probable and material, the award will be set aside. The mere fact that the arbitrators have set forth their reasons for their decision creates a presumption that they intended to decide according to law, and to refer the point for the opinion of the court, so that those aggrieved might take advantage of it. In such a case the mistake of law vitiates their opinion, for it is not the opinion they intended to give.[11]

While an award made upon an unqualified submission cannot be impeached as contrary to law unless the error appears on its face and works a substantial injustice, the rule is otherwise on a submission which provides that the arbitrator shall make his award "according to the legal rights of the parties" except as to interest which should be determined "with equity and fairness" and as to which the creditor waives his legal right. Under such a submission the arbitrator is bound to decide in conformity with the law and has no authority to do otherwise.[12]

§ 36. Correction of Mistake in Award.—In arbitrations had under the statute, the court is authorized in certain instances to correct mistakes in the award. Hence, the code provides that

"The court may, on motion, modify or correct the award, where it appears—

11. Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

12. Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 162 Pac. 631. See infra, § 44, as to necessity that mistake appear on face of award; and infra, § 36, as to correction of mistakes in award.

"1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein;

"2. When a part of the award is upon matters submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;

"3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded."[13]

The rule has been declared that where the arbitrators have published their award by delivering it to the parties, it is no longer subject to revision or correction by them, even to correct mistakes, without the consent of the parties, and any alteration without such consent will vitiate it.[14] But the making of a new and supplementary paper and attaching it to the award after delivery does not vitiate the original award, and may be treated as surplusage.[15]

§ 37. **Fraud.**—It is a well-settled rule that courts of equity, in the absence of statute, may set aside awards for fraud.[16] The agreements of parties cannot divest the courts of this inherent right; nor is the rule altered under a system where law and equity are blended together.[17] However, the code expressly provides that the court may, on motion, vacate an award where "it was procured by corruption or fraud."[18]

13. Code Civ. Proc., § 1288.

14. Dudley v. Thomas, 23 Cal. 365 (citing authorities generally); Porter v. Scott, 7 Cal. 312.

15. Dudley v. Thomas, 23 Cal. 365. See infra, § 45, as to right of court to strike out surplusage on motion.

16. Peachy v. Ritchie, 4 Cal. 205 (stating the general rule); Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313 (stating the general rule).

17. Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

18. Code Civ. Proc., § 1287 (in part).

See note, 8 A. L. R., as to improper attempt by influencing or attempting to influence decision as ground for revocation of arbitration, or for avoidance of award thereunder.

The fraud which will vitiate an award may lie back of it, in the procuring of an agreement on which it was based. Thus where arbitrators appointed to ascertain the amount of loss under an insurance policy did not appoint a time for hearing, nor hear proofs, nor exercise any independent judgment in making their award, but made it pursuant to an agreement between one of them (representing that he acted for the insured) and the insurer, that the loss should be fixed at a certain sum, and where the insurer's consent to this agreement was obtained by fraud, the award could have no greater validity than the agreement on which it was based, and did not bind the insurer.[19]

§ 38. Misconduct.—It is provided by the code that the court may, on motion, vacate the award where,

"The arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced."[20]

However, the statute gives no higher right to set aside an award than might have been asserted in equity in case of fraud, mistake or accident.[1]

The awards of arbitrators, who need not be and frequently are not learned in the law, will not be viewed in the light of that strict adherence to legal rules and procedure which is expected in purely judicial trials. In recognition of this principle, the statutory grounds for modifying or vacating an award do not include mere ordinary errors or even faults of judgment, but only things that are gross.[2] As it may be otherwise expressed it is

19. Stockton Combined Harvester & Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

20. Code Civ. Proc., § 1287 (subd. 2). See infra, § 47, as to waiver of misconduct.

1. Peachy v. Ritchie, 4 Cal. 205 (the statute is but a reaffirmance of the common law).

2. In re Connor, 128 Cal. 279, 60 Pac. 862.

such misconduct as constitutes improper conduct in fact, as contradistinguished from a mere error of judgment.[3]

Misconduct in failing to hear pertinent evidence is covered by subdivision 2 of section 1287 of the Code of Civil Procedure above quoted rather than by subdivision 3 of the same section providing that the award may be vacated because the arbitrators "refused, or improperly omitted, to consider a part of the matters submitted to them," which refers to a failure to consider matters contained in the submission.[4] Misconduct or gross error under subdivision 2 of section 1287, to whatever class it may belong, must be such as to prejudice the party complaining; and the obvious meaning of that subdivision is that any misconduct complained of under that section, including refusing to hear pertinent evidence, must be of such a character that the rights of the party complaining were prejudiced thereby.[5]

§ 39. **Award of Costs.**—Arbitrators have the power to award costs, though no mention of costs is made in the articles of submission.[6] In a case where certain parties defendant in several actions brought against them by separate plaintiffs enter into a separate arbitration agreement with each of the plaintiffs, it has been held to be the duty of the arbitrators to make a separate award of costs in each submission. An award of costs jointly to plaintiffs is invalid. In such case the right to contest the award for such invalidity is waived by the defendants, either by consenting to a single hearing or by paying to each plaintiff the amount of damages separately awarded to him.[7]

3. Peachey v. Ritchie, 4 Cal. 205. See infra, § 45, as to award good in part and bad in part.

4. Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004. See supra, § 32.

5. Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004.

6. Dudley v. Thomas, 23 Cal. 365.

7. Springer v. Schultz, 64 Cal. 454, 2 Pac. 32.

§ 40. Entry of Award as Judgment—Statutory Provisions.—It is only by virtue of a statute that judgment may be entered upon the award of arbitrators and enforced as a judgment of the court. In the absence of a statute, the only method of enforcing an award is by action. The practice of making the award a rule of court and enforcing it by attachment as for a contempt, an innovation introduced by the English courts, is not sanctioned by American courts. A judgment may be entered by confession for the amount specified in an award in the same way that it may for the sum mentioned in a bond, note, or other instrument; but such a judgment is one by confession, and not a judgment on the award. Nor would a consent to arbitration amount to a confession of judgment for the amount awarded.[8]

Entry of the award made in statutory proceedings for arbitration, as a judgment of the court, is provided for in the code as follows:

"When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of the filing of the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment-book, and thereupon has the effect of a judgment."[9]

It further provided that

"The award may be enforced by the court in the same manner as a judgment."[10]

8. Gunter v. Sanchez, 1 Cal. 45.

9. Code Civ. Proc., § 1286 (in part). See infra, § 41.

10. Code Civ. Proc., § 1283 (in part). See supra, § 27, as to conclusiveness of judgment entered on award.

§ 41. Entry by Clerk.—Section 1286 of the Code of Civil Procedure is substantially a replica of section 385 of the Practice Act.[11] Under this provision it is not necessary, after filing the award with the clerk, to obtain an order of the court or judge to enable the clerk to make entry of it as a judgment of the court. All that is necessary is to present to the clerk the affidavit provided for by the statute, showing that notice of the filing of the award has been given the adverse party at least four days before, and that no order staying the entry has been served. The agreement to arbitrate is itself a consent that judgment shall be so entered, and it may be entered by the clerk like a judgment by default, subject to the action of the court as provided by statute.[12]

The clerk acts in such matter as a mere ministerial officer, and can enter such a judgment only when the necessary showing has been made, since the presumptions, if they are to be indulged in favor of such a judgment, may have been overcome. As the only remedy open is by motion made before the entry of the judgment, the notice required by section 1286 of the Code of Civil Procedure is of vital importance. Unless that notice be given or waived, the judgment would not be valid.[13] And a judgment entered on an award which is void because made after the time limited therefor had expired is likewise void.[14] It has been held that where a party to a statutory arbitration procures judgment to be entered on the award in less than five days after it was filed with the clerk, in violation of the statute, and without the affidavit which the statute requires, he cannot after-

11. See supra, § 40.

12. Carsley v. Lindsay, 14 Cal. 390 (where it is said that the intimation in Heslep v. City of San Francisco, 4 Cal. 1, that a motion and an order obtained from the court for the entry of judgment on the award were necessary, was dictum and erroneous).

13. In re Kreiss, 3 Cal. Unrep. 475, 28 Pac. 806.

14. Ryan v. Dougherty, 30 Cal. 218.

ward set aside the judgment as irregularly entered, for this would be to allow him to take advantage of his own wrong.[15]

§ 42. Action on Award.—The common-law method of enforcing an award is by action, except in those cases where the submission was made a rule of court, and enforced by attachment, as for a contempt.[16]

It has been held that an award effecting a partition of real property will be enforced by a decree for specific performance, and this, notwithstanding the submission contains a clause by which each party binds himself to the other in a sum named, as a penalty, to arbitrate the award; nor will an offer of defendant to pay the penalty prevent such decree.[17]

Where an award requires one party to pay the other a sum certain, and also requires the parties to execute mutual releases, the tender of a release is not a condition precedent to an action for the money, the award of the money being absolute and unconditional, while the execution of the releases is concurrent so that neither party could compel the other to release without tendering a release by himself.[18]

Notice of the award, in a submission to arbitration at common law, is a necessary prerequisite to the commencement of a suit upon it.[19] And it is a general rule that in an action upon an award arbitrators cannot be called as witnesses to explain anything vague or uncertain in their award.[20]

§ 43. Pleading.—In an action on an award, which is in the nature of an adjudication of the rights and liabilities

15. Hoogs v. Morse, 31 Cal. 128.

16. Gunter v. Sanchez, 1 Cal. 45. See supra, § 40.

17. Whitney v. Stone, 23 Cal. 275.

18. Dudley v. Thomas, 23 Cal. 365.

19. Mahoney v. Spring Valley Water Works Co., 52 Cal. 159.

20. Alexander v. McNear, 28 Fed. 403, 12 Sawy. 82. See infra, § 44, as to impeachment of award by testimony of arbitrator in proceedings to vacate.

of the parties thereto, it is not necessary to allege or prove that the defendant expressly promised to perform the award, for the law implies the promise to perform from the fact of the submission.[1] But this rule does not apply to an arbitration to determine the amount of loss under an insurance policy, for such an award does not fix the liability of the insurer to pay under the policy, but merely determines the amount to be paid in the event that there is any liability at all, so that no action can be maintained on an award of this character.[2] And this is especially true where the submission itself provides that the award shall not be taken as a waiver by the insurer of any provision or condition of the policy.

Where the insured in a suit for a loss under a policy alleges that the amount was submitted to arbitration and a certain sum awarded, and that the insurer agreed to pay this award, the action is on such promise to pay and not on the policy, nor on the award as such, and a finding that no such promise was made invalidates the judgment. Nor can the allegation that the insurer agreed to pay the award be disregarded.[3] In such an action to determine such a loss the complaint must specifically allege the award, or show that it was prevented by the fraudulent conduct of the insurer. An allegation that the plaintiff has "duly performed and kept" all the conditions of the policy is not sufficient. Where the complaint, although it set out the policy, thereby disclosing the provisions as to the award, makes no mention of any award having been made, or of any reason why it was not, it does not state a cause of action, and a demurrer thereto should be sustained.[4] In any event, a want of notice of a hear-

1. Stockton Combined Harvester & Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633; Robinson v. Templar Lodge, 97 Cal. 62, 31 Pac. 609.

2. Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863. See supra, § 15, as to condition precedent.

3. Stockton Combined Harvester & Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

4. Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863.

ing before arbitrators may be pleaded as a defense in an action at law on the award.[5] An allegation of a right to recover outside the award, when the stipulation of the defendants is substantially and only to abide the award, is a material defect in a declaration; but unless such a defect is taken advantage of by demurrer, it cannot avail the defendant.[6]

Variance.—In a case where a complaint in a suit for a partnership accounting fails to plead a previous agreement for arbitration between the parties and an award thereunder, proof of such facts, in the absence of amendment, constitutes a variance, nor is an amendment pleading only a portion of the award sufficient to cure the error. But a variance between a complaint which fails to plead an arbitration agreement and award thereunder, and proof of such agreement and award, will not be deemed prejudicial error on appeal, when the facts are all before the court, and the only contest is as to the value of certain items of property as to which the award is conclusive.[7]

§ 44. Modifying and Vacating Award—In General.—The only grounds for a motion to vacate or modify an award are specified in sections 1287 and 1288 of the Code of Civil Procedure; and the grounds for vacating an award under section 1287 include only cases of fraud, corruption, misconduct, or gross error, or, where the arbitrators have refused to hear pertinent evidence, or otherwise acted improperly, "in a manner by which the rights of the parties are prejudiced," or where they have "exceeded their powers," or have refused to consider part of the matters submitted to them, or where the award is indefinite, or cannot be performed. These

5. Curtis v. City of Sacramento, 64 Cal. 102, 28 Pac. 108.

6. Mortifiori v. Engels, 3 Cal. 431.

7. Foster v. Carr, 135 Cal. 83, 67 Pac. 43.

grounds do not include mere ordinary errors nor even faults of judgment. They refer to things that are "gross."[8]

The statutory provisions for a review of arbitration proceedings are for the sole purpose of preventing the misuse of the proceedings, where corruption, fraud, misconduct, gross error, or mistake has been carried into the award to the substantial prejudice of a party to the proceeding. The design was to avoid useless proceedings and to make the practice simple and as speedy as would be consistent with justice.[9]

An award made upon an unqualified submission will not be set aside on the ground that it is contrary to law, unless error appears on the face of the award and causes substantial injustice.[10] But a different rule obtains where the arbitrators are required by the terms of the submission to determine the rights of the parties according to law, as in such a case a failure to so determine is sufficient ground to avoid the award.[11] A court of equity may still interfere to correct fraud or mistake appearing on the face of an award, even though the parties to an arbitration may covenant not to appeal from the award. Such an agreement cannot operate to oust courts of law or equity of their proper jurisdiction.[12]

Under the provision of the statute specifying misconduct and gross error as grounds for setting aside the

8. In re Connor, 128 Cal. 279, 60 Pac. 862. See supra, §§ 26, 29–38, inclusive, as to the grounds provided by these sections for modifying or vacating the award.

9. Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 162 Pac. 631.

10. Utah Construction Co. v. Western Pac. R. Co., 174 Cal. 156, 162 Pac. 631; Pierson v. Norman, 2 Cal. 599; Tyson v. Wells, 2 Cal. 122.

11. Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 162 Pac. 631.

12. Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

The report of a referee and the award of an arbitrator are, in all essentials, the same in effect, and neither can be set aside at the mere discretion of the court. Grayson v. Guild, 4 Cal. 122. See REFERENCE.

award, the misconduct or error complained of must have been prejudicial, and, in analogy to similar applications for relief in other proceedings, this prejudice must be shown affirmatively. It may be made to appear either from the nature of the misconduct or error, or from other explanatory facts. But mere conclusions are not sufficient; the facts must be stated. And mere admissions of an arbitrator as to his failure to consider certain evidence, made after the completion of the award and its filing with the clerk of the court, cannot be received to impeach the award.[13] The court may, on motion, modify or correct the award, where it appears that "the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded."[14] And when the award has been vacated on motion as provided by statute, it is provided that

"The court . . . may order a new hearing before the same arbitrators, or not, in its discretion."[15]

§ 45. Award Good in Part and Bad in Part.—An award may be good in part and bad in part; or void pro tanto or in toto, and may, therefore, be enforced or not accordingly. But if the parts are inseparable, the whole must stand or fall together.[16] The same rule has been thus stated: Where an award is not attacked for fraud, and the subject matter is in its nature divisible, courts should distinguish between those portions which are good and those which are not, and should not set aside those which are correct.[17] This rule is embodied in the code provision to the effect that the court may, on motion, modify or correct the award, where it appears that "a

13. Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004. See supra, § 42, as to admissibility of testimony of arbitrator to explain award in action thereon.

14. Code Civ. Proc., § 1288 (in part).

15. Code Civ. Proc., § 1287. (See infra, §§ 35–38, as to grounds upon which new hearing may be ordered.)

16. Williams v. Walton, 9 Cal. 142.

17. Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted."[18]

Under this statute, matter improperly inserted by arbitrators at the close of their award, which covers matters not submitted and which can be separated from other parts and does not affect the decision on the matters submitted, is properly stricken out.[19] But where the decision of arbitrators upon a principal matter in controversy, under a general submission intended by the parties to result in a complete determination of all matters in dispute between them, is invalid, and the award, in consequence, incomplete, the doctrine that an award may be good in part and bad in part is inapplicable. That doctrine applies only to instances where there has been an excess of power in the arbitrators by their attempting to determine matters not submitted, or where there is uncertainty or illegality in an independent and distinct matter forming no consideration for other parts of the award, and the settlement of which could not have contributed to induce the arbitration. It is not, and never has been, the law that in any other instances, upon the submission of several matters or in a general submission upon the proper presentation to the arbitrators of several matters, an award upon a part was good.[20]

§ 46. Stay of Proceedings—Motion to Modify.—If the agreement of submission under which an award is made is valid as a statutory submission, the court has no right to stay proceedings on the judgment, however erroneous the action of the arbitrators may have been. Relief from such irregularities can be had only in the manner and

18. Code Civ. Proc., § 1288 (subd. 2).

19. In re Connor, 128 Cal. 279, 60 Pac. 862. See supra, § 36, as to disregarding supplementary paper as surplusage.

20. Muldrow v. Norris, 12 Cal. 331. See infra, § 48, as to showing required on appeal where award is objected to as embracing matters not submitted.

upon the grounds specified in sections 1287 and 1288 of the Code of Civil Procedure. Where, however, the judgment entered by the clerk is absolutely void because not supported by a valid statutory agreement of submission, the court has power to set it aside, with or without a motion therefor. If the award, though not good under the statute, is valid as a common-law award, the court may properly deny the motion to set it aside, as the effect of granting such an order would be to declare the award invalid for any purpose.[1] Where a motion under the statute[2] to modify or correct the award is granted, the order should direct judgment to be entered.[3] An award is properly modified by striking out matter inserted therein which was not included in the submission, and is a part thereof which can be separated from other parts, and does not affect the decision on the matter submitted.[4]

§ 47. Waiver of Defects.—Where a party to an arbitration proceeding takes judgment on the award made, and is then paid the amount awarded and receives it in satisfaction of the judgment, such action constitutes a waiver of any errors or misconduct on the part of the arbitrators of which he had notice at the time. And he is charged with notice of all errors or misconduct which were known to his attorney.[5] One who accepts such benefits, even in part, and who has then led the other party to act upon it, cannot afterward be heard to object,[6] for the acceptance of partial payments made on an award constitutes a waiver of any irregularities therein.[7] It has been held that a party to a common-law arbitration who accepts an unsigned copy of the award without

1. Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740.

2. Code Civ. Proc., § 1288.

3. Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 162 Pac. 631.

4. In re Connor, 128 Cal. 279, 60 Pac. 862.

5. Hoogs v. Morse, 31 Cal. 128.

6. Matter of Silliman, 159 Cal. 155, 113 Pac. 135.

7. Ramish v. Marsh, 178 Cal. 217, 172 Pac. 1100.

objection and enters into negotiations for carrying it into effect waives the signature thereto by the arbitrators.[8]

§ 48. Appeals—Jurisdiction and Subject Matter.—It was said in an early case, decided before the creation of the courts of appeal, that the constitution gave the supreme court jurisdiction of appeals from judgments entered upon awards; and it was formerly thought an appeal lay from the judgment entered on an award of arbitrators.[9] This jurisdiction must now be deemed to have passed to the courts of appeal to such extent as is consonant with the general limitations upon their jurisdiction.[10] The Code of Civil Procedure, however, provides that

"The decision upon the motion [to vacate or modify the award] is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion made cannot be subject to appeal."[11]

In the case specified in the last clause of this provision, the appeal must be taken from the decision on the motion.[12] And it is now settled that in no case can an appeal be taken from the judgment itself, even though the judgment has not been entered until after a motion to vacate or modify the award has been decided. The reasoning which supports this view is as follows: Where a motion is made to modify the award as provided by section 1288 of the Code of Civil Procedure, the order

8. Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

9. Fairchild v. Doten, 42 Cal. 125. See Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313 (holding that this jurisdiction cannot be ousted by an agreement of the parties, as in the bond for the submission of the controversy not to appeal. And an appeal may nevertheless be taken from the denial of a motion to set aside the award).

10. For the general jurisdiction of the courts of appeal, see Const., art. VI, § 4.

11. Code Civ. Proc., § 1289.

12. In re Connor, 128 Cal. 279, 60 Pac. 862.

made thereon should direct the entry of judgment, and in that case an appeal from the decision on the motion would embrace the judgment. If a motion is made to vacate the award under section 1287 of that code, and is granted, an appeal from the order will afford the aggrieved party all the relief he is entitled to. If such a motion is denied and the award has not been entered as a judgment, but is entered later, the denial of the motion to vacate is in effect an order for the entry of the judgment and the judgment will be embraced in the appeal from such order. In any case, where an appeal is taken from the denial of a motion to vacate, correct or modify an award, it must of necessity embrace any judgment on the award, whensoever entered. It is clear, therefore, that there is no necessity for a direct appeal from such a judgment.[13]

Where, on appeal, an award is objected to on the ground that it embraces matters not in fact submitted, though within the general terms of the submission, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their authority. Without such showing the award will be sustained. Thus, where the agreement of submission recited a sale and resale of certain lands, out of which transaction disputes and misunderstandings had arisen, and the submission was of "all and every matter of dispute arising from or growing out of the transaction, aforesaid," an award that one party receive from the other a certain amount of money and convey to him the lands mentioned is prima facie authorized by the submission.[14]

§ 49. Procedure and Judgment on Appeal.—Under section 1289 of the Code of Civil Procedure,[15] an appeal must be taken within the same time as appeals from orders

13. Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 162 Pac. 631.

14. Blair v. Wallace, 21 Cal. 317.

15. See supra, § 48.

generally.[16] If alleged errors committed by arbitrators on the hearing of matters submitted to them can be reviewed at all on appeal, in the same general way in which alleged errors of a court committed during a trial before it can be reviewed,—which is doubtful,—then the error should be made to appear in the same manner required in the case of a trial before a court. An ex parte affidavit setting forth such alleged errors, and facts on which a motion to vacate the award is based, cannot take the place of a bill of exceptions or settlement of a statement of the case, nor be considered on appeal.[17]

The findings of arbitrators as to matters duly submitted to them will not be disturbed on appeal where the evidence was conflicting. Following this rule, the evidence on which they acted not being contained in the record, and contradictory affidavits of the parties as to what the evidence was, are not open to consideration in the appellate court.[18] Accordingly, where a motion to vacate an award was heard in the court below on conflicting affidavits, the supreme court will presume on appeal, in support of the action of the court below in denying the motion, that the facts were established according to the affidavits of the respondents.[19]

Where the decision of arbitrators upon a principal matter in dispute has been set aside on appeal, and the judgment rendered on the award accordingly vacated, the

16. Fairchild v. Daten, 38 Cal. 286.

17. In re Connor, 128 Cal. 279, 60 Pac. 862.

18. Meloy v. Imperial Land Co., 163 Cal. 99, 124 Pac. 712; Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92. See Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313 (holding, that where the appellate court has reversed the action of the court below in denying a motion to set aside an award, a contention by the appellee that portions of the award are good and should not be set aside, should be addressed to the court below).

19. Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004 (holding, where an arbitrator refused to hear pertinent evidence offered that was competent and material and of a substantial character, and which tended to prove a fact found against the party offering it, that such refusal will be held on appeal to be necessarily such as prejudiced his rights).

award stands as though such matter had never been passed upon by the arbitrators, and hence is void for incompleteness.[20] However, an objection that the submission in arbitration proceedings under the statute, was not entered as required by law, will not, where not taken in the court below, be considered on an appeal from the denial of a motion to set aside the award.[21]

20. Muldrow v. Norris, 12 Cal. 331.

21. Simons v. Mills, 80 Cal. 118, 22 Pac. 25.

(C. M.)

ARCHITECTS.

I. IN GENERAL.
II. CONTRACT BETWEEN OWNER AND ARCHITECT.
III. ARCHITECT'S CERTIFICATE.

I. In General.

1. Scope of Article—Definition and Status.
2. Statutory Provisions.
3. Constitutionality of Statutes.

II. Contract Between Owner and Architect.

4. Duty and Liability of Architect.
5. Right to Compensation.
6. Evidence.

III. Architect's Certificate.

7. In General.
8. Waiver by Owner.
9. Refusal to Issue.
10. Conclusiveness.

I. IN GENERAL.

§ 1. Scope of Article—Definition and Status.—It is the purpose of this article to state the rules of law governing the practice of the profession of architecture in California, the degree to which architects are controlled by statute being indicated,[1] as is the measure of their rights

1. See infra, §§ 2, 3.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 125 Pac.

and liabilities.[2] Sufficiently close to the general subject matter of this article to merit treatment herein are the principles controlling the issuance and effect of certificates of architects in regard to work performed under building and construction contracts.[3]

Definition and status.—An architect is one whose occupation it is to form or devise plans and designs and to draw up specifications for buildings or structures, and to superintend their construction.[4]

Architects not infrequently engage in the business of building. However, such an occupation is not, properly speaking, part of the vocation of an architect. As building operations are ordinarily conducted, the architect acts, not as a contractor, but as the agent and representative of the person for whom the work is being done.[5] By the terms of building and construction contracts, architects are often constituted arbitrators for the determination of questions arising as to the completion, sufficiency, classification or amount of work performed by the contractor.[6]

§ 2. Statutory Provisions.—It is well recognized that for the protection of the public, the legislature has the power to regulate the practice of any particular profession which requires the possession of special knowledge, skill and training in its exercise, and that the profession of architecture is within such class.[7] As a necessary incident to this power the legislature has the authority to delegate to a commission or board trained in the profes-

2. See infra, §§ 4–6.

3. See infra, §§ 7, 8. See, also, CONTRACTS.

4. 2 Ruling Case Law, p. 399, § 1.

5. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 42 L. R. A. (N. S.) 125, 126 Pac. 351; Boswell v. Laird, 8 Cal. 469. See infra, § 4.

6. See infra, §§ 7, 8.

7. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56; Ex parte McManus, 151 Cal. 331, 90 Pac. 702. See ATTORNEYS AT LAW; DRUGS AND DRUGGISTS; PHYSICIANS AND SURGEONS.

sion of architecture the right to fix the qualifications of applicants desiring to practice such profession.[8]

Prior to the year 1901 there was no legislative restriction upon the right of any person to contract for or to furnish plans and specifications for another, or to follow the profession of architecture within this state.[9] However, in that year the legislature took action in this regard, passing an act entitled "An Act to Regulate the Practice of Architecture."[10] The act establishes a state board of architecture,[11] and empowers that board to examine persons who desire to follow the profession of an architect, and to issue to those showing proper qualifications certificates permitting the practice of architecture in accordance with the provisions of the act.[12] Architects in good standing at the time of the passing of the act are not required to pass an examination as a prerequisite to the obtaining of a certificate of practice.[13] By this act it is made a misdemeanor punishable by fine

"for any person to practice architecture without a certificate in this state . . . ; provided that nothing in this act shall prevent any person from making plans for his own buildings, nor furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished that he, the person furnishing such plans, is not a certified architect," etc.

The act also provides for the issuing of temporary certificates to nonresidents employed as architects to prepare plans and specifications for buildings or other structures within the state. Further, it provides that architect's certificates issued in accordance with the provisions of the act shall remain in full force until revoked for cause, such as for dishonest practices, or gross

8. Ex parte McManus, 151 Cal. 331, 90 Pac. 702.
9. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56.
10. Stats. 1901, p. 641.
11. Stats. 1901, p. 641, §§ 1, 2.
12. Stats. 1901, p. 641, § 3.
13. Stats. 1901, p. 641, § 4.

incompetency.[14] By an amendment to the act in 1903, provision was made for the payment of an annual license fee, the certificates of architects being subject to cancellation in case of nonpayment of such fee.[15]

Object of act of 1901.—The act of 1901, as a whole, shows that it was not intended to prevent the sale of plans prepared by a qualified person, but to prevent their preparation by an unqualified person unless the purchaser was informed of that fact. Its main object, so far as furnishing plans and specifications alone is involved, was to secure the erection of buildings from plans prepared by those who were sufficiently schooled in the profession to secure a license from the state board, and who had complied with the state law by securing such license.[16]

As to whom act is directed.—The act of 1901 is clearly directed only to individuals as distinguished from corporations. It requires an examination of the person who applies for license, and its language shows that a license can be given only to natural persons and not to artificial creations such as corporations. However, it is held that the act is effective upon corporations to this extent, that if they undertake to do business of this character, either the persons whom they engage therein must be certified architects under the statute, or when contracting for plans and specifications for the erection of buildings for other persons, such other persons must be informed that the plans and specifications will be prepared by someone who is not a certificated architect. So either a corporation or an individual may employ certificated architects, have them prepare plans and specifications, and furnish such plans and specifications to other persons without transgressing the terms of the act regulating the practice of architecture.[17] Under this statute it has also been held

14. Stats. 1901, p. 641, § 5.

15. Stats. 1903, p. 522.

16. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56; Ex parte McManus, 151 Cal. 331, 90 Pac. 702.

17. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56.

that a contract made by an architect before obtaining such a certificate is not thereby rendered void, but it is necessary to obtain the certificate before performing the contract.[18]

§ 3. Constitutionality of Statutes.—The question of the constitutionality of the act of 1901, regulating the practice of architecture, has been before the courts at various times. It has been said that this statute, viewed as a whole, can be upheld as a police measure only upon the theory that the legislature believed that to allow unskilled and unqualified persons to prepare plans and specifications for the erection of buildings is injurious to the public interests, owing to the dangers which might arise from defects in plans or construction.[19] The constitutionality of the provision of the act fixing the manner of the appointment of the board of architecture is amply sustained by the authorities.[20] It has been insisted that the act of 1901 is violative of sections 11 and 21 of article I of the California constitution, in that it discriminates in favor of architects who inform their patrons that they are not certificated architects, and grants to such class immunity from punishment which may be inflicted upon other architects who do not inform their patrons they are certificated architects.[21] The court, however, has refused to sustain this contention, declaring that there is no class discrimination as to uncertificated architects, but that, on the contrary, the act operates uniformly upon all that class. Nor, it is held, can the act be declared void as an attempt by the legislature to

18. Fitzhugh v. Mason, 2 Cal. App. 220, 83 Pac. 282.

19. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56. And see cases cited infra.

20. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56. Ex parte McManus, 151 Cal. 331, 90 Pac. 702 (citing Ex parte Gerino, 143 Cal. 412, 66 L. R. A. 249, 77 Pac. 166, as an authority conclusively disposing of this question. In this case a similar act providing for the appointment of a board of medical examiners is upheld).

21. Stats. 1901, p. 641, § 5.

delegate upon the board of architecture a duty which it should discharge itself, namely, that of fixing the standard or rules for determining the qualifications of applicants.[1]

Nor is discretionary or arbitrary power conferred under which discriminating, unreasonable, and unfair rules and regulations may be established. Such a provision is in the public interest, because the employer is thereby placed on his guard as to whether he will employ an architect who has not obtained the certificate which, if his skill and knowledge warranted, he could have obtained from the state board. In any event, the remedy for one injured by failure of the board to adopt reasonable rules and standards is to apply to the court under some proper and appropriate proceeding for relief. It does not justify an attack upon the validity of the act in habeas corpus proceedings.[2]

Though the constitutionality of the act regulating the practice of architecture has been uniformly upheld, it cannot be denied that it is a restriction of the otherwise inalienable right conferred upon individuals by article I, section 1, of the constitution to contract as they choose with reference to their property. However much this right of contract is subject to regulation by the police power of the state, the invasions this act makes on constitutional rights are not to be carried further than is necessary to protect the public from evils intended to be removed, unless the language compels such meaning, and such effect is reasonably calculated to secure the legitimate objects for which the power is exercised.[3]

1. Stats. 1901, p. 641, § 3.

2. Ex parte McManus, 151 Cal. 331, 90 Pac. 702 (in this case in a concurring opinion Shaw, J., forcibly declares that the board is merely required to determine whether or not the applicant has the qualifications which the law implies he must have, and that this is a ministerial or administrative function).

3. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56, per Shaw, J. See CONSTITUTIONAL LAW as to the police power and its limitations.

II. CONTRACT BETWEEN OWNER AND ARCHITECT.

§ 4. Duty and Liability of Architect.—It is unquestionably the rule that an architect, by every contract, implies his possession of skill and ability, and a promise to exercise them reasonably and without neglect.[4] From the time such a contract of employment is entered into, an architect as such, or as superintendent of the construction, becomes the trusted agent of his employer, and the latter may, without being guilty of negligence, rely implicitly upon representations of the architect made before or after the execution of the contract.[5]

As superintendent of the construction of an entire building, it is his duty to inspect and test the work, and to use due care and skill thereon.[6] But the law does not cast upon him any duty to keep secret the intentions of his employer with reference to the erection of a building, and in the absence of an agreement to do so, he is not bound to keep his knowledge of such matters to himself.[7]

Though it is true, that an architect by contracting to furnish plans and specifications implies his possession of a certain degree of skill as an architect, yet he does not impliedly warrant that his work will be free from miscalculations. Hence, it has been held, if miscalculations occur, they, taken alone, are not sufficient to establish negligence on his part. And an architect who skillfully draws plans for the alteration of a building cannot be held liable in damages because the plans involve an expense of construction beyond his estimate, particularly

4. Benenato v. McDougall, 166 Cal. 405, Ann. Cas. 1915C, 871, 49 L. R. A. (N. S.) 1202, 137 Pac. 8.

5. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 42 L. R. A. (N. S.) 125, 126 Pac. 351. See Brown v. Coffee, 17 Cal. App. 381, 121 Pac. 309, 311 (holding that an architect employed to furnish plans and specifications and to superintend building operations has no implied power to alter the terms of the contract between the contractor and the owner).

6. Hart v. Buckley, 164 Cal. 100, 128 Pac. 29.

7. Havens v. Donahue, 111 Cal. 297, 43 Pac. 962.

when the owner, before the commencement of the work, has means of knowing and sufficient notice to apprise a prudent man of the fact that the work cannot be done for the estimated sum. If in such a case the employer recklessly proceeds to make contracts which may make the cost of construction far above that estimated, he cannot then hold the architect responsible for the surplus expenditure.[8] But where an architect practices fraud upon his employer, as where he knowingly misrepresents the probable cost of erecting a structure, he is liable to him for the resulting damage. Moreover, the employer has the right, upon discovering the architect's fraud or deceit while the building is in an unfinished condition, to repudiate the contract and to complete the building at a reasonable cost, and in so doing he does not waive his right of action to recover damages for the architect's deceit.[9] When defects in construction, instead of being attributable to the architect, are due to a change of plans by the employer, the architect cannot, of course, be charged with damages for the defect.[10]

§ 5. Right to Compensation.—The rights of an architect to compensation for services rendered are usually fixed by the terms of the contract of employment. In the absence of an express agreement, the amount of compensation may be fixed by custom, or, under certain circumstances, by the rules established by architects' institutes and associations.[11] And, unless otherwise provided, it is reasonable to infer that the employer will be

8. Benenato v. McDougall, 166 Cal. 405, Ann. Cas. 1915C, 871, 49 L. R. A. (N. S.) 1202, 137 Pac. 8.

9. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 42 L. R. A. (N. S.) 125, 126 Pac. 351 (holding that it is legally a matter of indifference under the pleading whether fraudulent misrepresentations by an architect be considered the expression of an opinion or the representation of a fact).

10. Havens v. Donahue, 111 Cal. 297, 43 Pac. 962.

11. Laver v. Hotaling, 115 Cal. 613, 47 Pac. 593; Laver v. Hotaling, 5 Cal. Unrep. 534, 46 Pac. 1070.

liable only upon completed work.[12] Moreover, in such case, he may discontinue the employment at his option, paying the architect for services rendered and expenses incurred.[13]

In California, it is an established rule that where one directs an architect to make plans and specifications for a building and stipulates that the cost of erection under such plans and specifications shall not exceed a certain amount, the architect is entitled to no compensation for his work unless the construction can be done for the sum specified.[14] Nor is an architect entitled to compensation for plans when their adoption depends upon a contingency which does not happen.[15] But where there has been an unqualified acceptance of plans furnished under a valid contract, there may be a recovery even though the plans are not used.[16]

When an architect has contracted to furnish all necessary plans and specifications for the construction of a building, his commission to be based on the total cost, he cannot be limited to a commission on the cost of construction so far as the building has proceeded, if his employment terminates prior to the completion of the same.[17] In such a case, how-

12. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56; Fitzhugh v. Mason, 2 Cal. App. 220, 83 Pac. 282.

13. Fitzhugh v. Mason, 2 Cal. App. 220, 83 Pac. 282 (citing Civ. Code, §§ 1643, 1655).

14. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 42 L. R. A. (N. S.) 125, 126 Pac. 351.

15. Hall v. County of Los Angeles, 2 Cal. Unrep. 754, 13 Pac. 854.

16. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56. See Harris v. Central Union High School Dist. (Cal. App.), 188 Pac. 617 (holding that contract of a school board to pay an architect for plans and specifications of a school building, where the board adopted such plans "subject to a condition subsequent," to wit, that the architect should modify and change the plans and specifications to the satisfaction of the board, was complete, if, as a matter of fact, the board did not thereafter indicate its desire to have any modification or change made in them, and the architect stood ready to comply with the board's instructions and all the conditions of his contract).

17. Havens v. Donahue, 111 Cal. 297, 43 Pac. 962 (a finding by the court that the value of the services is the same as that claimed under the contract disposes of any question of contention about the contract).

ever, the architect may elect to sue upon a quantum meruit for the value of the services performed.

Negligent performance of an architect's duties entitles the employer, when sued for the value of the services, to a reduction for the damage actually caused by such negligence, and not merely to a reduction of the rate of compensation.[18] But in an action for the services of an architect the employer cannot counterclaim damages alleged to have resulted from the publication, by the architect, of drawings of the proposed building, when there has been no agreement by the architect to keep secret the intention of the employer.[19]

While it is generally conceded that noncompliance with provisions of the law regulating the practice of architecture, will be a bar to recovery for services rendered, nevertheless it has been held that in an action brought by one practicing architecture to recover for services rendered, it is not necessary to allege and prove compliance by him with the act, and thereby show that he is not guilty of a misdemeanor. Noncompliance with the statute is a matter of defense to be pleaded and proved by the defendant.[20] It has been held that though a corporation having a claim for services in preparing plans and specifications for a building has ceased to exist by reason of the forfeiture of its franchise, an assignment of the claim by its directors carrying on the business of the corporation as trustees under the statute declaring the forfeiture of the franchise is sufficient to confer upon the assignee all the right of the corporation in such demand.[1]

18. Hart v. Buckley, 164 Cal. 160, 128 Pac. 29.

19. Havens v. Donahue, 111 Cal. 297, 43 Pac. 962 (holding that a finding upon the issue of negligence will not be disturbed where the evidence is conflicting).

20. Harris v. Bucher, 25 Cal. App. 380, 143 Pac. 796 (under act of 1901, Stats. 1901, p. 641).

1. Binford v. Boyd, 178 Cal. 458, 174 Pac. 56.

Acceptance with reservations.—The board of trustees of a school district, having authority to contract for the construction of a school building, may, in making its contract with the architect or with the contractor, reserve the right to make alterations during the progress of the work, so long as the general plan of the building is not changed. Such a reservation, it has been held, is not inconsistent with a complete acceptance of such proposed plans and specifications.[2]

Rule as to interest.—If by the terms of the contract the compensation of an architect is definitely ascertainable, he is entitled to interest thereon from the time the amount is due. But a claim for the reasonable value of services rendered does not bear interest until the rendition of the judgment.[3]

§ 6. **Evidence.**—In an action by an architect to recover for services rendered, evidence of a rule of compensation established by architects' institutes and associations is not admissible when not accompanied by any proof that the rule was known to the defendant at the time of the alleged contract, or that it was so generally accepted by the public as to give it the standing of a custom, knowledge of which would be imputed to him.[4] But in an action to recover the alleged reasonable value of services performed, evidence as to the customary charges of architects for similar services is admissible to prove the value of the services; and although, upon cross-examination of the architect's witnesses and on the direct examination of his own witnesses, the employer brings out the fact that the customary rates of charges made by architects originated in, and conformed to, a rule established by an association of architects, which

2. Harris v. Central Union High School Dist. (Cal. App.), 188 Pac. 617.

3. Meyer v. Buckley, 22 Cal. App. 96, 133 Pac. 510.

4. Laver v. Hotaling, 5 Cal. Unrep. 534, 46 Pac. 1070.

rule as such was not binding upon the defendant, such fact does not render the evidence of the plaintiff incompetent. Such evidence is admissible regardless of the fact as to whether the employer is or is not ignorant of the customary rate of compensation.[5]

When, in an action by an architect for compensation for services, evidence tending to show the reasonable value of services rendered is introduced, it is error for the court to refuse to instruct the jury that such evidence is not binding on them but that they, in estimating the value of the services, have a right to exercise their own judgment.[6] If the verdict is amply supported by the evidence, the judgment will, as in other cases, be affirmed on appeal. Likewise, when the testimony is radically conflicting as to the agreement between the parties, the decision of the trial court will be upheld.[7]

III. ARCHITECT'S CERTIFICATE.

§ 7. In General.—Building and construction contracts very often contain a stipulation that the work shall be done to the satisfaction of a designated architect, and evidenced by a certificate to that effect;[8] or they may provide that in event of the failure or refusal of the contractor to complete the work in a satisfactory manner, the owner may, upon the architect's certificate to that effect, take charge of the work and complete it,[9] and that any damages incurred through the contractor's de-

5. Laver v. Hotaling, 115 Cal. 613, 47 Pac. 593 (holding that the action of the trial court in admitting plaintiff's evidence as to customary charges, and in refusing to strike it out after the defendant had proved the rule of the architects, was not erroneous).

6. Meyer v. Buckley, 22 Cal. App. 96, 133 Pac. 510.

7. Salfield v. Cohn, 29 Cal. App. 417, 155 Pac. 1007. See APPEAL AND ERROR.

8. Ahlgren v. Walsh, 173 Cal. 27, 158 Pac. 748; Coplew v. Durand, 153 Cal. 278, 16 L. R. A. (N. S.) 791, 95 Pac. 38.

9. Connell v. Higgins, 170 Cal. 541, 150 Pac. 769; American-Hawaiian Eng. etc. Co. v. Butler, 165 Cal. 497.

fault shall be certified by the architect, whose certificate shall be conclusive against the parties.[10]

It is a reasonable construction of such contracts that they contemplate the production of the certificate of the architect or architects actually superintending the work. Accordingly, if the architects originally engaged are discharged for any reason, there is a sufficient compliance with the contract if the certificate of the one subsequently engaged is obtained.[11] It is immaterial that the architect designated by the contract is not a professional architect. It is sufficient that he is the authorized architect of the owner, and his certificates are sufficient warrants for payments made under the contract.[12]

According to the general rule, during the life of a contract calling for a certificate of approval of an architect, the production of such a certificate is a condition precedent to a right of action on the contract.[13] There are certain exceptions to this rule, however.[14] On the termination of the contract, as by the destruction of the building, such a provision does not apply as to payments earned and due, especially where the owner has agreed that in such an event, he is to lose all that may be due the contractor under the terms of the contract.[15]

§ 8. Waiver by Owner.—Stipulations for the production of the architect's certificate, being for the owner's benefit, may be waived by him.[16] And such will be the effect

10. Connell v. Higgins, 170 Cal. 541, 150 Pac. 769; American-Hawaiian Eng. etc. Co. v. Butler, 165 Cal. 497; Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049; Tally v. Parsons, 131 Cal. 516.

11. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049; Griffith v. Happersberger, 86 Cal. 605, 25 Pac. 137, 487.

12. Bacigalupi v. Phoenix Bldg. etc. Co., 14 Cal. App. 632, 112 Pac. 892.

13. Ahlgren v. Walsh, 173 Cal. 27, 158 Pac. 748; Coplew v. Durand, 153 Cal. 278, 16 L. R. A. (N. S.) 791, 95 Pac. 38; Hettinger v. Thiele, 15 Cal. App. 1, 113 Pac. 121.

14. See infra, §§ 8, 9.

15. Ahlgren v. Walsh, 173 Cal. 27, 158 Pac. 748; Hettinger v. Thiele, 15 Cal. App. 1, 113 Pac. 121.

16. Blethen v. Blake, 44 Cal. 117; Dunne Inv. Co. v. Empire State S. Co., 27 Cal. App. 208, 150 Pac. 405, 411.

where the owner has made payments without requiring the production of the certificate.[17] Payments so made are not premature, however, when actually due, and even though not due, will not operate to discharge a surety on the contractor's bond, unless he has, by reason of such payments, suffered some harm or damage.[18] When there is evidence before the jury from which they might infer a waiver of the acceptance of a building by an architect before payment is made, instructions in favor of the owner as to the necessity of compliance with the condition to entitle the contractor to recover, where such instructions ignore the evidence as to the waiver, should be refused.[19]

§ 9. Refusal to Issue.—An architect may properly refuse to issue a final certificate of approval when, from the nature of the work, there might be latent defects not discoverable at the time of completion, but becoming patent after the lapse of time; or where, the defects being apparent, the architect has frequently called the contractor's attention to them.[20] And the fact that the architect's certificate is withheld, taken in connection with the fact that a contention is made by the owner that there has been a failure to complete the structure, has been said to be very persuasive evidence negativing the claim that an owner had made an unreserved acceptance of the work by entering into possession of the building.[1] It is not to be presumed, though, that the parties had intended that money rightfully belonging to the contractor should be forfeited upon the arbitrary will or caprice of the architect in withholding his certificate.[2]

17. Kling v. Bucher, 32 Cal. App. 679, 163 Pac. 871; Collins v. Ramish, 28 Cal. App. Dec. 844.

18. Dunne Inv. Co. v. Empire State S. Co., 27 Cal. App. 208, 150 Pac. 405, 411.

19. Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127.

20. Coplew v. Durand, 153 Cal. 278, 16 L. R. A. (N. S.) 791, 95 Pac. 38.

1. Machinery & Electrical Co. v. Young Men's Christian Assn., 22 Cal. App. 416, 134 Pac. 724.

2. Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79.

So when work had been properly completed and the architect, without justification, refuses to issue his certificate of approval, the necessity for such certificate is dispensed with.[3]

In an action by the contractor to recover the contract price of work performed, the architect having refused to give his certificate of approval, it has been held that a direct finding that the work was done to the satisfaction of the architect impliedly, yet positively, negatives the contention that the architect was, during the progress of the work, insisting that it was imperfect and incomplete.[4] In such a case it is not necessary that the contractor should plead an excuse for not obtaining the final certificate, but he should show his right thereto and that the certificate was wrongfully withheld.[5]

§ 10. Conclusiveness.—It is well settled that where the parties to a building contract thereby authorize the architect, as arbiter, to determine and certify the existence of a fact when such fact becomes material to a proceeding or right under such contract, the certificate of the architect, duly made, that the fact exists, is conclusive upon the parties with respect to the thing to be done, and to which such fact relates. And it is also a well-settled rule that such certificate can be impeached as to such facts only for fraud, or for gross mistake amounting to fraud.[6] When such a certificate is in a

3. American-Hawaiian Eng. etc. Co. v. Butler, 165 Cal. 479; Coplew v. Durand, 153 Cal. 278, 16 L. R. A. (N. S.) 791, 95 Pac. 38; Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049; Roebling Const. Co. v. Doe Estate Co., 33 Cal. App. 397, 165 Pac. 547; Kling v. Bucher, 32 Cal. App. 679, 163 Pac. 871; Machinery and Electrical Co. v. Young Men's Christian Assn., 22 Cal. App. 416, 134 Pac. 724; Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79. As to effect on sureties on contractor's bond of architect's wrongful refusal to issue certificate, see SURETYSHIP.

4. Coplew v. Durand, 153 Cal. 278, 16 L. R. A. (N. S.) 791, 95 Pac. 38.

5. Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79.

6. Connell v. Higgins, 170 Cal. 541, 150 Pac. 769; American-

proper form, it cannot be impeached by mere proof that it is incorrect.[7] Nor can the conclusiveness of the architect's certificate be attacked on the ground of lack of notice by the architect of his decision, if the contract does not call for such notice, for there is no such requirement made of architects by any provision of law.[8] A certificate of an architect, the sole function of which is to form a basis of notice for the termination of a contract, though conclusive upon any matter arising out of that proceeding, can be no more than prima facie evidence in any collateral matter. In order to render certificates operative, there must be compliance by the architect with the contract. And if such certificates contemplate forfeiture and the right of rescission, their terms are to be strictly construed.[9] Likewise, the contractor must have complied with requirements touching upon their validity before the certificate is rendered effective.[10] It has been held that whatever faithlessness there may be on the part of the architect in giving his certificates to the contractor before the latter is entitled to them (he not having paid the materialmen and laborers according to the contract), it cannot affect or prejudice the good faith of the owner in

Hawaiian etc. Const. Co. v. Butler, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280; Moore v. Kerr, 65 Cal. 519, 4 Pac. 542; Dingley v. Greene, 54 Cal. 333. See, also, ARBITRATION AND AWARD.

7. Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79 (holding that though the architect makes oral declarations both before and after the giving of the certificate showing that he was not satisfied with the building, these declarations can hardly be taken as impeaching the written certificate of approval given with full knowledge of the exact condition of the building). See Connell v. Higgins, 170 Cal. 541, 150 Pac. 769 (holding that the certificate of an architect as to the delinquency of a contractor, entitling the owner to take charge of and prosecute the work, is not vitiated by reason of a reference therein to a letter containing a demand for the resumption of the work by the contractor, the letter not being referred to for the purpose of incorporating therein such demand).

8. Dingley v. Greene, 54 Cal. 333.

9. American-Hawaiian etc. Const. Co. v. Butler, 165 Cal. 497, Ann. Cas. 1916C, 44, 133 Pac. 280.

10. Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54.

making payments upon the faith of the certificates; and in such a case the unpaid employees of the contractor are not entitled to enforce a lien on the property.[11]

11. Dingley v. Greene, 54 Cal. 333. See MECHANICS' LIENS.

(E. H. R.)

ARGUMENT OF COUNSEL.

See CRIMINAL LAW; TRIAL.

ARMS.

See WEAPONS.

ARMY.

See MILITARY.

ARRAIGNMENT.

See CRIMINAL LAW.

ARREST.

I. INTRODUCTORY.
II. ARREST WITHOUT WARRANT.
III. ARREST UNDER WARRANT.
IV. MAKING THE ARREST.
V. ARREST IN CIVIL ACTIONS.
VI. LIABILITY FOR MAKING OR CAUSING ARREST.

I. Introductory.

1. Scope of Article and Definition.
2. Privileges and Exemptions.

II. Arrest Without Warrant.

3. Authority Generally.
4. For Misdemeanor or Breach of the Peace.
5. By Private Person.
6. Arrest of Suspected Persons—Reasonable or Probable Cause.

III. Arrest Under Warrant.

7. Form and Validity of Warrant—By Whom Issued.
8. Complaint or Information.
9. Execution of Warrant.
10. Duty of Officer to Execute—Warrant as Protection.

IV. Making the Arrest.

11. Time of Arrest—Making Known Official Character.
12. Use of Force—Breaking Doors and Windows.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 194 Pac.

13. Homicide in Making Arrest.
14. Evidence in Cases of Homicide.
15. Resistance to Arrest Generally.
16. Homicide in Resisting.
17. Conspiracy to Resist.
18. Custody and Disposition of Prisoner.

V. Arrest in Civil Actions.

ON MESNE PROCESS.

19. Constitutional Inhibition Against Imprisonment for Debt.
20. Cases in Which Authorized—Nature of Remedy.
21. Affidavit and Order for Arrest Generally.
22. Averments as to Fraud, Generally—Existence of Cause of Action.
23. Averments of Specific Grounds.
24. Affidavits on Information and Belief.
25. Issuance and Validity of Order of Arrest—Discharge on Habeas Corpus.
26. Execution of Order of Arrest—Vacation of Order.

ON FINAL PROCESS.

27. Execution Against the Person Generally.
28. Proof of Fraud.
29. Discharge from Arrest—Second Arrest.

VI. Liability for Making or Causing Arrest.

30. Wrongful Arrest Generally.
31. Responsibility for Causing Arrest.

I. INTRODUCTORY.

§ 1. Scope of Article and Definition.—This article treats of the law as to arrests, both in civil and criminal actions. In considering arrest on criminal charges, it discusses the right to arrest without warrant, the right under warrant, the procedure in making the arrest, and liability for wrongful arrest. In discussing the right in civil cases, it treats of when such arrest is permitted, and the procedure to obtain it. It also treats in this connection of the right to an execution against the person of the

defendant in a civil action. Many other topics, while closely related to arrest generally, have been referred to more appropriate specific titles. The article excludes matters relating to arrest of fugitives from justice from other jurisdictions;[1] the recapture of fugitives from justice generally,[2] and rewards offered for the capture of such persons;[3] the right to arrest a person under certain special circumstances;[4] and the procedure to be followed by one who is wrongfully in custody to secure his release.[5] It excludes also, except as essential to a comprehension of topics included in the article, proceedings subsequent to arrest, such as the preliminary examination before a magistrate and commitment by him.[6] While the liability for a wrongful arrest is discussed generally, this article does not treat of the specific liability therefor.[7] Neither does it consider, in this connection, whether a wrongful arrest constitutes a particular offense.[8]

An arrest is defined in the Penal Code as "taking a person into custody, in a case and in the manner authorized by law."[9] It is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer.[10] This definition of arrest, and the question of when an arrest has taken place, are most frequently involved in cases where an officer or private person is being prosecuted for a wrongful arrest. These questions will be found fully discussed in other titles.[11]

§ 2. Privileges and Exemptions.—The constitution of California provides that

"Members of the legislature shall, in all cases, except treason, felony, and breach of the peace, be privileged

1. See EXTRADITION.
2. See ESCAPE AND RESCUE.
3. See REWARDS.
4. See CONTEMPT; ~~HUSBAND AND WIFE~~ Alimony and Separate Maintenance, Vol. 1, p. 1007; WITNESSES.
5. See HABEAS CORPUS. But see infra, §§ 25, 27, as to release from wrongful arrest in a civil action.
6. See CRIMINAL LAW.
7. See FALSE IMPRISONMENT; MALICIOUS PROSECUTION; PROCESS.
8. See ASSAULT AND BATTERY; KIDNAPING.
9. Pen. Code, § 834.
10. Pen. Code, § 835. See infra, IV.
11. See FALSE IMPRISONMENT; MALICIOUS PROSECUTION; PROCESS.

See "Erratum," 1926 Supp. 196

from arrest, and shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session."[12]

This provision is substantially the same as that found in the constitutions of the other states, and in the constitution of the United States, in respect to members of legislative bodies.[13] The constitution of California also provides that

"Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election going to and returning therefrom."[14]

Although a witness who refuses to testify voluntarily may be arrested and brought before the court where his attendance is required,[15] every person who, in good faith, has been served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of witnesses may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, and while necessarily remaining there and returning therefrom.[16] An arrest under such circumstances is a contempt of court, for which the person making the arrest may be held liable.[17] The Code of Civil Procedure also provides for the discharge of such a person by order of the court before whom his attendance as witness is required.[18]

II. ARREST WITHOUT WARRANT.

§ 3. Authority Generally.—It is specifically provided by statute that an officer may, without a warrant, arrest

12. Const., art. IV, § 11.
See note, 1 A. L. R. 1156, as to immunity of public officers from criminal arrest.
13. 2 Ruling Case Law, p. 481.
14. Const., art. II, § 2.
15. Code Civ. Proc., §§ 1993, 1994.
16. Code Civ. Proc., § 2067.
17. Code Civ. Proc., §§ 2068, 2069.
18. Code Civ. Proc., § 2070. See WITNESSES.

a person, (1) for a public offense committed or attempted in his presence;[19] (2) when a person arrested has committed a felony, although not in his presence;[20] (3) when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it;[1] (4) on a charge made upon reasonable cause, of the commission of a felony by the party arrested;[2] (5) at night, when there is a reasonable cause to believe that he has committed a felony.[3]

It is not only the right, but the duty, of a peace officer to make arrests under any of the foregoing conditions.[3a] It is his duty in case the offense is committed in his presence; and he would be grossly neglectful of his duty if he failed to arrest a person whom he had reasonable cause to believe had committed a felony.[4] Even though there be no express code provision authorizing the arrest, without a warrant, of a person who, there is a reasonable ground for believing, is about to commit a felony, it has been held that it is the right, and, indeed, the duty, of an officer, where the circumstances require it, to make such an arrest before the damage is done.[5]

Summoning aid in making arrest.—Any person making an arrest may orally summon as many persons as he

19. Pen. Code, § 836, subd. 1; Kurtz v. Mott, 115 U. S. 487, 29 L. Ed. 458; Manwell v. Durst Bros., 178 Cal. 752, 174 Pac. 881. See infra, § 4, as to arrest for misdemeanor or breach of the peace.

20. Pen. Code, § 836, subd. 2; Lees v. Colgan, 120 Cal. 262, 52 Pac. 502; People v. Pool, 27 Cal. 572.

1. Pen. Code, § 836, subd. 3; People v. Pool, 27 Cal. 572; Michel v. Smith, 34 Cal. App. Dec. 656; Redgate v. Southern Pac. Co., 24 Cal. App. 573, 141 Pac. 1191. See infra, § 6.

2. Pen. Code, § 836, subd. 4; Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12. See infra, § 6.

3. Pen. Code, § 836, subd. 5; People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

See note, 1 A. L. R. 585, as to constitutionality of statute or ordinance authorizing an arrest without a warrant.

3a. Dorris v. McKamy, 40 Cal. App. 267, 180 Pac. 645.

4. Lees v. Colgan, 120 Cal. 262, 52 Pac. 502; Pen. Code, § 142.

5. People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064.

deems necessary to aid him therein.[6] And the Penal Code provides for the punishment by fine of "every male person above eighteen years of age," who refuses or neglects to assist in the making of certain arrests when lawfully required to render such aid.[7] A magistrate may orally order a peace officer or a private person to arrest anyone committing or attempting to commit a public offense in the presence of such magistrate.[8]

§ 4. For Misdemeanor or Breach of the Peace.—Where an officer has no warrant for the arrest of a person, and such person has not committed a felony, or there is no reasonable cause for believing that he has committed a felony, the only justification which can be alleged for an arrest is that the person arrested had committed a misdemeanor in the presence of the officer.[9] The general rule is that an arrest without a warrant is justifiable, for an offense so committed.[10] An arrest upon suspicion, or upon information of others, that a misdemeanor has been committed is wholly unauthorized, and the arrest in such a case, being without process, makes the person who accomplishes the same guilty of false imprisonment, which is either a high-grade misdemeanor or a felony, depending upon the use or nonuse of violence in effecting the arrest.[11]

6. Pen. Code, § 839; People v. Lathrop, 32 Cal. App. Dec. 1107, 192 Pac. 722; People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064; and see § 727, Pen. Code, as to right of officers and magistrates to command the aid of all persons present or within the county to aid, where necessary, to arrest rioters.

7. Pen. Code, § 150.

8. Pen. Code, § 838.

9. Pen. Code, § 836; People v. Craig, 152 Cal. 42, 91 Pac. 997; Ferguson v. Superior Court, 26 Cal. App. 554, 147 Pac. 603; People v. Gilman, 31 Cal. App. Dec. 1087, 190 Pac. 205; People v. Matthews, 6 Cal. Unrep. 341, 58 Pac. 371.

10. People v. Nihell, 144 Cal. 200, 77 Pac. 916. See supra, § 3.

11. Ex parte Dillon (Cal. App.), 186 Pac. 170 (citing Pen. Code, § 236).

An offense is deemed to have been committed in an officer's presence if, as a witness, he can testify from actual knowledge to every element of the offense. It makes no difference that the offense cannot be committed by a single act observable at one point of time. A series of acts extending over a considerable period of time, and only constituting a criminal offense because of their continuance and repetition, alone or in conjunction with other circumstances, being capable of observation and actual knowledge by a peace officer, will justify him, when the series of acts is complete, in making an arrest without a warrant as fully as in the case of any other misdemeanor committed or attempted in his presence.[12] And ordinarily it will be assumed, in the absence of evidence to the contrary, that police officers in making arrests for a misdemeanor acted legally, and that the arrest was rightfully made.[13] It does not follow, however, that because an officer may be justified or excused by reason of information in making an arrest upon common repute, that a failure to act upon the same information would render the officer liable for neglect of duty.[14]

An arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the arresting officer. But this rule does not preclude a peace officer from arresting a person for a misdemeanor at any time during the period of its continuation, even though known to the officer long prior to the arrest.[15]

12. People v. Craig, 152 Cal. 42, 91 Pac. 997 (holding that where the officer has knowledge of a series of continued acts constituting vagrancy by legal definition it is a misdemeanor committed in the presence of the officer); Ferguson v. Superior Court, 26 Cal. App. 554, 147 Pac. 603 (holding that an officer might be justified in making an arrest for keeping a house of prostitution, although he did not see all the acts constituting the offense).

13. Ex parte Dillon (Cal. App.), 186 Pac. 170.

14. Ferguson v. Superior Court, 26 Cal. App. 554, 147 Pac. 603.

15. People v. Craig, 152 Cal. 42, 91 Pac. 997.

Necessarily a large discretion must be vested in a peace officer in making an arrest without a warrant. Having the power to disperse mobs and otherwise preserve the peace, it follows that he may make arrests as a necessary means of performing such duty.[16]

§ 5. By Private Person.—The Penal Code provides that one private person may arrest another for a public offense committed or attempted in his presence.[17] The Penal Code further provides that one private person may arrest another when the person arrested has committed a felony, although not in his presence.[18] A private person may also arrest another when a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.[19]

For the purpose of surrendering the defendant on a criminal charge, the bail, at any time before their final discharge, and at any place within the state, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower a person of suitable age and discretion to do so.[1]

Arrest of vagrant or beggar.—It has been held error to refuse an instruction to the effect that a private person has no right to attempt to arrest a person for begging, and that such person is justified in resisting such arrest or attempting to free himself from the hold of said person, upon ascertaining that the person so arresting him was not an officer authorized to make an arrest.[2] And while an employee of a railroad company has a right to remove

16. Ferguson v. Superior Court, 26 Cal. App. 554, 147 Pac. 603 (vagrancy).

17. Pen. Code, § 837, subd. 1; Manwell v. Durst Bros., 178 Cal. 752, 147 Pac. 881; People v. Gleason, 127 Cal. 323, 59 Pac. 592; People v. Raten, 63 Cal. 421.

18. Pen. Code, § 837, subd. 2.

19. Pen. Code, § 837, subd. 3; People v. Melendrez, 129 Cal. 549, 62 Pac. 109.

1. Pen. Code, § 1301. See BAIL AND RECOGNIZANCE.

2. People v. Denby, 108 Cal. 54 40 Pac. 1051.

a beggar from its cars, and to protect passengers from annoyance by him, he has no right to arrest him. In case of such arrest the person arrested is justified in resisting unlawful detention by such employee.[3]

§ 6. Arrest of Suspected Persons—Reasonable or Probable Cause.—The general rule is that to constitute probable cause or reasonable cause such as will justify one in arresting another on a criminal charge, there must be such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.[4] In considering the question of whether a peace officer who killed a person sought to be arrested, without warrant, had probable cause to arrest the deceased, the facts and circumstances presented to him at the time he was required to act are to be considered.[5] And it has been held that the fact that the person arrested on probable cause may have been an innocent and reputable citizen, fleeing from an assailant, does not affect the question as to whether the officer had probable cause to believe him guilty of a felony.[6] In the absence of evidence to the contrary, it will be assumed that the officer has reasonable cause for the arrest.[7]

Question of law or fact.—The question of whether a peace officer had probable cause to suspect the guilt of the person sought to be arrested is a question of law, to be determined by the court. When the facts in reference

3. People v. Denby, 108 Cal. 54, 40 Pac. 1051. As to resisting arrest generally, see infra, § 15. See VAGRANCY.

4. People v. Melendrez, 129 Cal. 549, 62 Pac. 109; People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

5. Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43; People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799 (where a person killed by an officer was fleeing, at night, pursued by a person shouting "stop thief," the officer has reasonable ground to believe he may have committed a felony).

6. People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

7. Lees v. Colgan, 120 Cal. 262, 52 Pac. 502.

to the alleged probable cause are admitted or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted, and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause.[8] But it does not follow that the court is at liberty to instruct the jury that one charged with making an unlawful arrest has failed to make out a defense of probable cause. The rule is never applied, as against the defendant in a criminal case, to establish a want of probable cause for a mistaken belief, nor should it be. For in such cases the degree of intelligence evinced by the defendant must always be an important element in determining his guilt. So an instruction taking the question from the jury and stating that in contemplation of law, assuming all the evidence to be true, the officer had no reasonable cause to arrest, and that he was guilty of an unlawful act if he attempted forcibly to arrest, is improper, and derogates from the constitutional functions of the jury.[9]

III. ARREST UNDER WARRANT.

§ 7. Form and Validity of Warrant—By Whom Issued.—A warrant of arrest is an order in writing, in the name of the people, signed by a magistrate, commanding

8. Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463; People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799; Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; Fulton v. Onesti, 66 Cal. 575, 6 Pac. 491; Harkroder v. Moore, 44 Cal. 144; Grant v. Moore, 29 Cal. 644.

9. People v. Melendrez, 129 Cal. 549, 62 Pac. 109.

the arrest of the defendant.[10] If the warrant designates the offense charged in statutory terms, it is a sufficient compliance with the code provision.[11] The Penal Code prescribes that

"The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city, or town where it is issued, and be signed by the magistrate, with his name of office."[12]

Any defect or infirmity in a warrant can be objected to or raised by the person arrested himself while he is held in custody under such warrant. But when he has been examined, and evidence adduced sufficient to justify the magistrate in holding him to answer, such defect or infirmity is immaterial, since the prisoner is thereafter held under the commitment. The warrant is then functus officio.[13]

Ordinarily, after making an arrest under a warrant, the officer must take the person arrested before the magistrate issuing the warrant. In case of his absence or inability to act, however, the prisoner can be taken to the nearest or most accessible magistrate in the same county.[14] To enable an officer to take the party arrested before another magistrate than the one issuing the warrant, it is not essential that the warrant should contain a direction to that effect.[15]

Where an information is filed against a person in a county for an offense triable in another county, the warrant issued must require the defendant to be taken before the nearest or most accessible magistrate of the

10. Pen. Code, § 814 (giving the form of warrant to be substantially followed); Harris v. Superior Court, 34 Cal. App. Dec. 291 (construing provisions of National Prohibition Act with reference to arrest); Pankewicz v. Jess, 27 Cal. App. 340, 149 Pac. 997.

11. People v. Brown, 59 Cal. 345; In re McCue, 7 Cal. App. 765, 96 Pac. 110.

12. Pen. Code, § 815.

13. People v. Staples, 91 Cal. 23, 27 Pac. 523. See CRIMINAL LAW.

14. See infra, § 18.

15. Ex parte Branigan, 19 Cal. 133.

county in which the offense is triable, and the depositions of the informant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered.[16]

Issuance of warrant.—A warrant of arrest may be issued by any magistrate.[17] Those who are magistrates, and consequently those who may issue a warrant of arrest, are: 1. The justices of the supreme court; 2. The judges of the superior court; 3. Justices of the peace; 4. Police magistrates in towns or cities.[18] A warrant of arrest may also be issued by a county coroner, if a coroner's jury find that a person was killed by another, under circumstances not excusable or justifiable by law, or if it find that the death was occasioned by the act of another by criminal means.[19]

§ 8. Complaint or Information.—Under sections 811, 812 and 813 of the Penal Code, a magistrate has no jurisdiction to issue a warrant without some evidence tending to show the guilt of the party named in the warrant.[19a] The original information may be sufficient, however, though made only on information and belief, if followed by the deposition of the complainant, or some other witness, stating facts tending to show the guilt of the party charged.[20] Such depositions must be taken before the magistrate himself; and a complaint that is verified before a deputy clerk is not a deposition authorizing the issuance of a warrant of arrest.[1]

16. Pen. Code, § 827.

17. Pen. Code, § 807; People v. Crespi, 115 Cal. 50, 46 Pac. 863; Tulare County v. Fern, 32 Cal. App. Dec. 184, 19 Pac. 855; People v. Swain, 5 Cal. App. 421, 90 Pac. 720.

18. Pen. Code, § 808; Ex parte Granice, 51 Cal. 375.

19. Pen. Code, §§ 1517–1519. See CORONERS.

19a. Ex parte Blake, 155 Cal. 586, 102 Pac. 269; Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619; People v. Storke, 39 Cal. App. 633, 179 Pac. 527.

20. Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619. See as to nature of complaint, People v. Sacramento Butchers' Assn., 12 Cal. App. 471, 107 Pac. 712.

1. In re Sing, 13 Cal. App. 736, 110 Pac. 693.

The original information, if it contains positive evidence of facts tending to show guilt, may be sufficient as the basis for the issuance of a warrant.[2] But a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of the citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime.[3] On this same principle, an affidavit, sent by the Governor of another state, to support a requisition for an offender under the laws of that state, which merely charges the person requisitioned with an offense on the "information and belief" of the affiant, is totally insufficient to authorize the issuance of a warrant of arrest by the Governor of California.[4] This rule is not, however, applicable to the issuance of warrants charging a misdemeanor cognizable by justices or magistrates. The Penal Code provides that a warrant shall be issued in a justice's or police court if the magistrate is satisfied from the complaint that the offense complained of has been committed. There is no provision in the law for the taking of depositions or evidence to support the complaint, as in the case of felonies.[5] Warrants in the case of misdemeanors of the lower grade are therefore allowed where the complaint or information is on information and belief, for if this were not the rule many offenders whose guilt could easily be established would escape.[6]

If the information or complaint under which a warrant of arrest is issued is defective, through being on in-

2. People v. Staples, 91 Cal. 23, 27 Pac. 523, holding a complaint which is positive and direct in its allegation is a sufficient deposition; Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619; In re Sing, 13 Cal. App. 736, 110 Pac. 693 (holding verified complaint may be treated as deposition).

3. Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619.

4. Ex parte Spears, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608. See EXTRADITION.

5. Pen. Code, §§ 1426, 1427.

6. Ex parte Blake, 155 Cal. 586, 18 Ann. Cas. 815, 102 Pac. 269.

formation and belief, or through failure to state facts sufficient to justify arrest for the offense charged, such defects can be objected to by the person arrested while held under the warrant, but cannot be objected to after examination before a magistrate and an order holding the person charged has been issued. After commitment, imperfections of the complaint, if any, are immaterial, and the commitment is legal.[7] The object of the statutes in providing for the issuance of a warrant is that the defendant may be brought before the committing magistrate. When he is once there, and an examination of the case is had in pursuance of the terms of the statute, and he is held to answer, a foundation is laid for an information.[8]

§ 9. **Execution of Warrant.**—The Penal Code provides that a warrant of arrest must be directed to and executed by a peace officer.[9] A peace officer is defined by the Penal Code, as amended in 1913, as a sheriff of a county, or a constable, marshal, or policeman of a township, city or town, or inspectors of the California state board of pharmacy, not exceeding ten in number.[10]

If a warrant is issued by a justice of the supreme court, or judge of a superior court, it may be directed generally to any sheriff, constable, marshal or policeman in the state, and may be executed by any of those officers to whom it may be delivered.[11] If it is issued by any other magistrate it may be directed generally to any sheriff, constable, marshal or policeman in the county in which it is issued, and may be executed in that county; or, if the defendant is in another county, it may be executed therein upon the written direction of a magistrate of that county, indorsed upon the warrant, signed by him, with his name

7. People v. Lee Look, 143 Cal. 216, 76 Pac. 1028; People v. Wheeler, 65 Cal. 77, 2 Pac. 892; People v. Velarde, 59 Cal. 457; In re Sing, 13 Cal. App. 736, 110 Pac. 693. See CRIMINAL LAW.

8. People v. Velarde, 59 Cal. 457. See infra, § 18.

9. Pen. Code, § 816; Harris v. Superior Court, 34 Cal. App. Dec. 291.

10. Pen. Code, § 817.

11. Pen. Code, § 818.

of office, and dated at the county, city, or town where it is made, to the following effect: "This warrant may be executed in the county of ——" [naming the county].[12] Such indorsement, however, must be accompanied by a certificate of the county clerk of the county where the warrant was issued, or the affidavit of a witness, attesting the signature of the officer making the indorsement.[13] An officer may make an arrest in obedience to a warrant delivered to him.[14] And in its execution, he must carry the warrant with him, and show it, if demanded, to the person sought to be arrested.[15]

Serving warrant by telegraph.—It is provided by the Penal Code that a justice of the supreme court, or a judge of a superior court, may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof, by telegraph, and thereafter a telegraphic copy or copies of such warrant may be sent by telegraph to one or more peace officers, and any such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it as though he held an original warrant issued by the magistrate making the indorsement.[16] Every officer causing telegraphic copies of warrants to be sent, must certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder.[17]

§ 10. Duty of Officer to Execute—Warrant as Protection.—When a warrant, valid on its face and issued by a court of competent jurisdiction, is placed in the hands of an officer for execution, it is his duty, without delay, to carry out its demands and arrest the person named therein. Failure to serve a warrant issued by a proper court would be disobedience to a lawful order of the

12. Pen. Code, § 819; Allen v. Napa County, 82 Cal. 187, 23 Pac. 43.
13. Pen. Code, § 820.
14. Pen. Code, § 836.
15. See infra, § 11.
16. Pen. Code, § 850.
17. Pen. Code, § 851.

court, for which the officer could be punished.[18] A warrant is said to be regular on its face when it proceeds from a court, officer or body having authority of law to issue process of that nature, and which is legal in form, and which contains nothing to notify or fairly apprise anyone that it is issued without authority.[19]

It is well settled that for the proper execution of a warrant regular on its face the officer incurs no liability, however disastrous may be the effect upon the person against whom it is issued.[20] But when lack of authority is apparent on the face of the warrant, the officer should not serve the illegal process, and if he does so it is at his peril.[1]

As to person arrested.—The authority derived from a warrant justifies the officer in arresting no one but the person named therein against whom it is issued; and for any interference on the part of the officer with the liberty of a person other than the one named in the writ renders the arresting officer liable in trespass.[2] Accordingly, it is held that an officer will not be justified in arresting a person other than the one named in the warrant even if he is the one intended. And a warrant is no defense to an officer who arrests and refuses to release the wrong person, although bearing the same name, where an investigation would have disclosed the fact of his innocence.[3] It is presumed, however, that the officer has faithfully performed his duty, and has arrested the person named in the warrant, unless the presumption is overcome by other evidence.[4] Where it appears that a

18. People v. Fick, 89 Cal. 144, 26 Pac. 759; Kalish v. White, 36 Cal. App. 604, 173 Pac. 494; Pankewicz v. Jess, 27 Cal. App. 340, 149 Pac. 997.

19. Pankewicz v. Jess, 27 Cal. App. 340, 149 Pac. 997.

20. Kalish v. White, 36 Cal. App. 604, 173 Pac. 494. See FALSE IMPRISONMENT.

1. Pankewicz v. Jess, 27 Cal. App. 340, 149 Pac. 997.

2. Miller v. Fano, 134 Cal. 103, 66 Pac. 183; People v. Fick, 89 Cal. 144, 26 Pac. 759; Kalish v. White, 36 Cal. App. 604, 173 Pac. 494.

3. Kalish v. White, 36 Cal. App. 604, 173 Pac. 494.

4. People v. Fick, 89 Cal. 144, 26 Pac. 759.

process, regular in form and legally issued, describes the person arrested by his name, which is the usual way, and it further appears that he is the person for whom it was intended, even if the officer is in doubt as to whether or not the person arrested is the person who committed the crime, he is not bound to decide the question; he acts within his duty in taking the person into custody, and thus permitting the question of identity to be decided at a later time. The warrant, in such a case, is a complete defense to an action against the officer.[5]

IV. MAKING THE ARREST.

§ 11. Time of Arrest—Making Known Official Character.—An arrest may be made on any day, and at any time of the day or night, if the offense charged is a felony. If the offense is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate, indorsed upon a warrant, except when the offense is committed in the presence of the arresting officer.[6] The Penal Code provides as follows:

"The person making an arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape."[7]

The word "escape," as employed in the code section just quoted, is not used in the technical sense of an escape from custody, but rather in the sense of flight from the scene of the crime to avoid being arrested and

5. Kalish v. White, 36 Cal. App. 604, 173 Pac. 494.

6. Pen. Code, § 840.

See note, 9 A. L. R. 1350, as to time at which arrest is made as affecting legality or liability for making it.

7. Pen. Code, § 841; People v. Pool, 27 Cal. 572 (decided under Stats. 1851, p. 226, § 134, later reenacted in Penal Code, § 841).

being brought to justice. "Immediate pursuit," as used in the same section, is substantially the same as "fresh pursuit," so frequently used in common-law phraseology in criminal cases. The phrase, "when the person sought to be arrested is . . . pursued immediately . . . after an escape," is not to be taken so strictly as to defeat its reasonable operation. "Immediate" is a word of relation, and as a measure of time is itself governed in degree by the events and circumstances to which it stands in a qualifying connection.[8] The reason that notification of official character of the person making an arrest is not required when the party is apprehended in the commission of an offense, or upon fresh pursuit afterward, is because he must know the reason why he is arrested. Furthermore, in the case of a public officer, such as a sheriff or constable, acting in his own district, his authority to make arrests of persons who have recently committed crime is to be deemed a matter of notoriety. And if a constable, in fresh pursuit of criminals, who had reason to apprehend pursuit, calls out, in coming upon them in some such way as: "You are my prisoners—surrender!" these words are a sufficient notice of his character as a peace officer. The right to arrest on fresh pursuit without giving notice of official character is not limited to peace officers. A private person may arrest one who has committed a felony, without a warrant and without informing him of the cause thereof, provided such arrest be made on pursuit immediately after the commission of the offense.[9] If the person making an arrest is acting under

8. If, after the commission of a felony, the guilty parties flee to avoid arrest, and within three or four hours are pursued by officers for the purpose of apprehending them, and the officers by diligent pursuit overtake them at a distance of twelve miles from the place where the crime was committed, that is an immediate or fresh pursuit of the criminals. People v. Pool, 27 Cal. 572.

9. People v. Pool, 27 Cal. 572; Stats. 1851, p. 227, §§ 140, 141 (later re-enacted in Pen. Code, § 841).

the authority of a warrant, he must, if required by the party sought to be arrested, show the warrant.[10]

§ 12. Use of Force—Breaking Doors and Windows.—It is provided by the Penal Code that

"When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.[11]

So it is correct to instruct a jury that an officer in making an arrest has the right to use all the force which, from the surrounding circumstances, seems to him, as a reasonable man, necessary; and that he has the right to go armed if he deems it prudent.[12] But an officer must not use any more force than is necessary to accomplish the arrest. If he inflicts unnecessary blows or uses a deadly weapon without having it appear that resort to such a measure was essential to protect himself, or to effect the arrest, he will be held liable.[13] Furthermore, in making an arrest, he is not justified in using a deadly weapon, acting on the assumption that the person sought to be arrested is armed, from his mere belief in that fact. Circumstances must be such as to reasonably warrant that belief; and so it has been held that a refusal of the court to instruct the jury that it was immaterial whether the person sought to be arrested was armed or not, if defendant believed he was armed, is not error.[14]

Breaking doors and windows.—A peace officer or a private person may be justified in breaking doors or windows, to effect an arrest. The Penal Code provides in this connection that

"To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open

10. Pen. Code, § 842.
11. Pen. Code, § 843.
12. People v. Adams, 85 Cal. 231, 24 Pac. 629.
13. Towle v. Mathews, 130 Cal. 574, 62 Pac. 1064.
14. People v. Adams, 85 Cal. 231, 24 Pac. 629.

the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."[15]

Even inner doors may be broken. And the code further provides:

"Any person who has lawfully entered a house for the purpose of making an arrest may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.[16]

§ 13. Homicide in Making Arrest.—The Penal Code provides that homicide is justifiable when committed by public officers and those acting by their command, in their aid and assistance,

"When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.[17]

Consequently, on the trial of an officer charged with homicide in effecting an arrest, it has been held to be prejudicial error to refuse an instruction to the effect that a homicide is justifiable when necessarily committed in a lawful attempt to arrest a person who has committed a felony.[18] The question whether the act of a police officer in shooting a person in attempting to effect an arrest was or was not an act of criminal negligence on his part is purely one of fact, for the jury to determine, and in the decision of such question the officer is entitled to the

15. Pen. Code, § 844.

16. Pen. Code, § 845.

17. Pen. Code, § 196, subd. 3. See HOMICIDE as to justifiable homicide generally.

18. People v. Adams, 85 Cal. 231, 24 Pac. 629.

benefit of any reasonable doubt arising upon the evidence.[19]

Homicide in making arrest for misdemeanor.—The law generally recognized by the authorities is that neither an officer nor a private citizen who has arrested a person for a misdemeanor has the legal right intentionally to kill or to injure seriously the one arrested merely to prevent his escape.[20] While an arresting officer or private citizen has the right to pursue an escaping prisoner and use whatever force may be necessary for his arrest and detention,[1] and, to accomplish the purpose, may summon other persons to assist him,[2] he must, nevertheless, stop short of killing or seriously injuring the fleeing criminal, unless, of course, it is done in self-defense.[3] In this connection it has been said:

"It would indeed be abhorrent to the moral sense of every right-thinking citizen to uphold such brutality where the offense involved is so petty as a mere misdemeanor and the arrest is attempted without a warrant."[4]

If a peace officer is charged with homicide for killing a misdemeanant he was attempting to arrest, it is for the jury to say, judging from all the circumstances, as to whether the shooting amounted to a crime for which the conviction of the officer could be had. And upon this question of fact, if the verdict is against the officer, an appellate tribunal has no right to say that the determination of the jury should have been otherwise.[5]

19. People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

See note, 7 A. L. R. 313, as to civil liability for killing or injuring one who was attempting to make an arrest.

20. People v. Lathrop (Cal. App.), 192 Pac. 722.

1. Pen. Code, § 835. See supra, § 12.

2. Pen. Code, § 893. See supra, § 3.

3. People v. Lathrop (Cal. App.), 192 Pac. 722; People v. Melendrez, 129 Cal. 549, 62 Pac. 109; People v. Wilson, 36 Cal. App. 589, 172 Pac. 1116.

4. People v. Lathrop (Cal. App.), 192 Pac. 722.

5. People v. Wilson, 36 Cal. App. 589, 172 Pac. 1116.

§ 14. Evidence in Cases of Homicide.—It is a vital point for an officer who kills in attempting to make an arrest for felony, to show that he was doing his duty at the time of the homicide, and any incompetent evidence submitted to the jury for the purpose of showing that he was transcending his duty or exceeding his rights as an officer is prejudicial error. Thus, testimony for the purpose of showing that the person killed by an officer in an attempt to arrest him for assault with a deadly weapon had become reconciled to the man with whom he had quarreled, before the officer attempted to make the arrest, is prejudicial to the officer, if the officer had good reason to believe that a felony had been committed by the person he was attempting to arrest. And the testimony of a magistrate that he had not issued a warrant for the arrest of a person killed by an officer in attempting to make an arrest is perhaps immaterial, but its admission is not prejudicial to an officer, charged with murder of such person.[6] Where a police officer killed a man in attempting to arrest him, knowing nothing of his business, and did not recognize him at the time of shooting, evidence that the person killed was in the place where he was shot on that particular occasion on lawful business has been held to be wholly irrelevant and immaterial.[7] Where certain testimony is offered which shows that the person killed in an attempt to arrest him had undoubtedly committed a felony, it is error to refuse an instruction that if the testimony is true, such person had committed a felony. If he had committed a felony, it was the undoubted duty of a police officer charged with his death to arrest him, and to use sufficient force for that purpose. This is a cardinal point in the defense of an officer so charged, and he is entitled to have the law affecting it given to the jury, if

6. People v. Adams, 85 Cal. 231, 24 Pac. 629.

7. People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

the theory of the defense is justifiable killing in the performance of duty.[8]

§ 15. Resistance to Arrest Generally.—*Resistance to unlawful arrest.*—The right of a person to resist an unlawful attempt to arrest him is generally recognized.[9] Since a person has the right to resist an unlawful arrest, it is competent for the prosecution to present, in attempting to convict one of an assault in resisting arrest, all evidence that could be produced to prove that the attempted arrest was legal. If the evidence to show the lawful character of the attempted arrest is relevant, it is immaterial that it also shows that the person sought to be arrested had committed other offenses than the offense of assault in resisting arrest.[10]

Resistance to lawful arrest.—While a person has the right to resist an unlawful arrest, it is an undoubted principle of law that one cannot resist an officer making an arrest in the lawful discharge of his duty. In fact, the Penal Code, makes it punishable by fine and imprisonment for any person to willfully resist, delay, or obstruct any officer, in the discharge, or attempt to discharge, any duty of his office.[11] But a person resisting a lawful arrest may, aside from being punishable for obstructing justice, be guilty of an assault with a deadly weapon,[12] or murder,[13] or any other crime he may commit in carrying out his unlawful object.

If a person is charged with resisting an officer under section 148 of the Penal Code, an allegation in the in-

8. People v. Adams, 85 Cal. 231, 24 Pac. 629.

9. People v. Craig, 152 Cal. 42, 91 Pac. 997; People v. Denby, 108 Cal. 54, 40 Pac. 1051 (arrest for vagrancy by person not an officer); People v. Dallon, 21 Cal. App. 770, 132 Pac. 1064.

10. People v. Craig, 152 Cal. 42, 91 Pac. 997.

11. Pen. Code, § 148; People v. Pedde, 25 Cal. App. 34, 142 Pac. 894. See infra, § 15. See OBSTRUCTING JUSTICE.

12. People v. Nihell, 144 Cal. 200, 77 Pac. 916. See ASSAULT AND BATTERY.

13. See infra, § 16.

formation that the defendant did "resist, delay, and obstruct" an officer in the performance of his duty is sufficient, being in the language of the statute. The means and manner of the obstruction, resistance, or delay are matters of evidence, and it is not necessary to allege them. For the same reason the acts which constitute the offense for which the defendant was arrested need not be set out. It is sufficient if the offense be described in the words of the statute.[14] The fact that a person lawfully arrested is never prosecuted for the offense he committed, and for which he was arrested, affords no defense to an action against him for resisting the officer who arrests him.[15]

Resistance by third person.—The right of one person to aid another in defending against a threatened illegal arrest is defined by the Penal Code.[16] The right exists substantially as it existed under the common law. A third person cannot interfere, however, except in aid of a lawful resistance by the person threatened. So where the evidence shows that the person sought to be arrested was resisting, but it is disputed, and far from clear, that his resistance was lawful, the court should not instruct a jury that the attempted arrest was illegal and unlawful, and that the person charged, or any third person, was justified in lawfully interfering to prevent the illegal arrest, provided that they did no more than was necessary for that purpose. A court may not, in instructing a jury, assume any fact to have been conclusively proven, even where the evidence is without conflict.[17] But a person cannot be convicted of obstructing justice by means of resistance to an officer if there is entire lack of any evidence to show that the intent of the person at the time the officer encountered him was to delay or

14. People v. Hunt, 120 Cal. 281, 52 Pac. 658.

15. People v. Nihell, 144 Cal. 200, 77 Pac. 916.

16. Pen. Code, § 694.

17. People v. Craig, 152 Cal. 42, 91 Pac. 997. It appeared that in this case the person sought to be arrested was guilty of vagrancy, within the knowledge of the officer making the arrest.

obstruct the officer in arresting persons guilty of a public offense.[18]

§ 16. Homicide in Resisting.—The malicious killing of one who is endeavoring to make an arrest in the lawful exercise of his authority is murder.[19] Accordingly, it has been held, that, where a night watchman, called upon by an officer to assist him in making an arrest for crime, is killed in the attempt to make the arrest, it is immaterial whether he was an officer de jure or de facto, as he was duly authorized by a qualified officer to make the arrest, and the killing was in either event equally unlawful.[20]

While there can be no doubt that a person has the right to resist an unlawful attempt to subject him to arrest, the right to oppose an illegal arrest by resorting to the extreme measure of taking life has never been laid down as a sound doctrine of the law, except where there exist, or appear to exist, to the person thus sought to be arrested, at the time the arrest is being attempted, circumstances which, being sufficient to excite the fear of a reasonable man, would justify in him the belief that he was about to be injured in body or limb, or that his life was endangered by the party or officer attempting to make such arrest.[1] To justify killing an officer under such circumstances it is not necessary that the danger be actual. It is enough if it be apparent. A party may lawfully act upon appearances which would put a reasonable man in fear of danger, and he will not be held liable even though it should afterward appear that the indica-

18. People v. Rivera, 24 Cal. App. 531, 141 Pac. 1074.

19. People v. Pool, 27 Cal. 572; People v. Raten, 63 Cal. 421 (attempted arrest by private citizen for assault with intent to commit murder).

20. People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064 (in this case the court lays down the rule approved in People v. Gilman, 31 Cal. App. Dec. 1087, 190 Pac. 205, that where, in resistance to an illegal arrest, the extreme of taking the life of the officer is resorted to, the homicide cannot, at most, be more than manslaughter); Pen. Code, § 839.

1. People v. Bradley, 23 Cal. App. 44, 136 Pac. 955; People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064.

tions upon which he acted were entirely false, and that he was not in actual peril.[2] Whether the person sought to be arrested is justified in resisting to the extent of taking life is a question of fact which must be determined by the circumstances of each case.[3]

§ 17. Conspiracy to Resist.—It is a well-known rule that where several persons conspire to commit a crime, each conspirator is responsible for everything done by his confederates which follows incidentally in the execution of the common design as one of its natural and probable consequences, and this, even though it was not intended as a part of the original or common plan. The act, however, must be the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and not a fresh and independent product of one of the confederates.[4] Pursuant to this rule, if several persons conspire together to commit a robbery, and to resist arrest even to the taking of life, and after the robbery is committed take the life of an officer in resisting arrest by him, whatever is said or done by any one of them in furtherance of the common design is a part of the res gestae, and the act of all.[5] In such case, any one of the coconspirators can be held accountable for the killing; and this is true notwithstanding the fact that the particular conspirator did not do any of the shooting.[6]

Whether the act committed by one of several conspirators was the ordinary and probable effect of the common design, or whether it was a fresh and independent product of the mind of the one committing it, outside

2. People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064.

3. People v. Pool, 27 Cal. 572 (holding the homicide not justifiable); People v. Bradley, 23 Cal. App. 44, 136 Pac. 955 (holding the homicide not justifiable).

4. See CONSPIRACY.

5. People v. Kauffman, 152 Cal. 331, 92 Pac. 861; People v. Pool, 27 Cal. 572.

6. People v. Kauffman, 152 Cal. 331, 92 Pac. 861.

of, or foreign to, the common design, is a question of fact for the jury, and if there be any evidence to support its finding on this question its determination is conclusive.[7] Applying the principles above stated, where six persons conspired to commit a burglary, but desisted therefrom, and while returning from the place where the crime was to have been committed one of them, resisting arrest, shot and killed the policeman who attempted to make the arrest, it has been held that the fact that all were armed but one, and the further fact that several of them had burglar's tools, was sufficient to warrant the jury in finding that the conspiracy embraced the purpose of resisting arrest, even to the extent of taking human life in going to and returning from the scene of the proposed burglary.[8]

§ 18. Custody and Disposition of Prisoner.—Other articles must be consulted for discussion of those proceedings which follow the arrest of an alleged criminal, such as admission to bail,[9] and the preliminary examination, and the commitment of the prisoner for trial.[10] Here attention is given only to those proceedings which may be considered as a part of the arrest, while the prisoner is still in the custody of the arresting officer.

The Penal Code prescribes the rights and duties of an officer or private person who makes an arrest. Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken.[11] An officer may also take from the

7. See CONSPIRACY.

8. People v. Kauffman, 152 Cal. 331, 92 Pac. 861 (holding that pistols carried by persons conspiring to commit a burglary, or any other unlawful act, afford strong evidence that the conspiracy included the purpose to resist arrest, even to the extent of taking life); People v. Woods, 147 Cal. 265, 109 Am. St Rep. 151, 81 Pac. 652.

9. See BAIL AND RECOGNIZANCE.

10. See CRIMINAL LAW.

11. Pen. Code, § 846. An instruction charging that a peace officer in making an arrest has the right

person arrested the money and property found on his person, provided a receipt is given therefor, and the property, with a copy of the receipt, is given for safekeeping to the clerk or person in charge of the police station.[12] The Penal Code also provides that an officer, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law.[13] The code further provides that if the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant[14] without unnecessary delay;[15] or, in case of the absence or the inability of such magistrate to act, before the nearest or most accessible magistrate in the same county.[16] The object of the law is effected if the officer takes the party before another magistrate, in case the first one is absent or unable to act. And the only right which the prisoner can exact from the change, in case he insists upon examination, is that the affidavits upon which the warrant for his arrest was issued shall be transmitted to the new magistrate, or if they cannot be procured, that the prosecutor and his witnesses shall be summoned to give their testimony anew.[17]

If the person arrested is charged with a misdemeanor, and is arrested in some other county than that where the offense was committed, the officer must, if required by the person arrested, take him before some magistrate of the county in which the arrest is made, who must admit him to bail.[18] An officer making an arrest in the county of his jurisdiction for an offense triable in another county, under a warrant issued in his county, must take the person ar-

to take from the person arrested all offensive weapons does not imply that an officer neglected his duty in failing so to do. People v. Adams, 85 Cal. 231, 24 Pac. 629.

12. Pen. Code, §§ 1412, 1413.

13. Pen. Code, § 848.

14. Pen. Code, § 821.

15. Pen. Code, §§ 145, 825.

16. Pen. Code, § 824; Ex parte Branigan, 19 Cal. 133.

17. Pen. Code, § 826; Ex parte Branigan, 19 Cal. 133.

18. Pen. Code, § 822. See BAIL AND RECOGNIZANCE.

rested before the nearest or most accessible magistrate of the county in which the offense is triable, and must deliver to him the depositions and the warrant, with his return indorsed thereon.[19]

When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate.[20] A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer.[1]

V. ARREST IN CIVIL ACTIONS.

On Mesne Process.

§ 19. Constitutional Inhibition Against Imprisonment for Debt.—The California Constitution provides as follows:

"No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of willful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace."[2]

The constitution of 1850 contained a similar article except that no provision was contained therein permitting arrests for torts in cases of willful injury to person or property. The clause, "Nor in civil actions for torts, except in cases of willful injury to person or property," following the word "fraud" in the article from the constitution of 1879 quoted above, is not contained in the constitution of 1850. The clause above quoted was em-

19. Pen. Code, § 828.
20. Pen. Code, § 849.
1. Pen. Code, § 847.
2. Const. 1879, art. I, § 15. See In re Crane, 26 Cal. App. 22, 145 Pac. 733.

bodied in the constitution of 1879, for the reason, no doubt, that under the constitution of 1850 it had been held that a provision of the Practice Act authorizing an arrest of a defendant for "a willful injury to person or character" was unconstitutional.[3]

The effect of article I, section 15, of the constitution is to abolish the right of a creditor to control and confine the person of his debtor by the process of arrest, save in the case of fraud.[4] However, there is considerable controversy over just what constitutes a "debt" within the inhibition of the constitutional provision. It has been held that money due as wages,[5] money received by a person as agent,[6] and money due a receiver,[7] all constitute "debts" within the meaning of this article, for nonpayment of which the debtors cannot be arrested and imprisoned, in lack of a showing of fraud.[8]

On the other hand, it has been held that money in the hands of an executor is not a "debt" within the constitutional inhibition, and that proceedings in settlement of an estate are not a civil action.[9] Likewise, a sum ordered to be paid as alimony in a suit for divorce is not a debt within such article of the constitution.[10] And it has been held that a judgment declaring void the transfer of certain choses in action to the defendant, and directing him to pay the sum realized thereon to the person who

3. Ex parte Prader, 6 Cal. 239.

4. In re Crane, 26 Cal. App. 22, 145 Pac. 733.

5. In re Crane, 26 Cal. App. 22, 145 Pac. 733.

6. In re Holdforth, 1 Cal. 438.

7. Knutte v. Superior Court, 134 Cal. 660, 66 Pac. 875.

8. See Soule v. Hayward, 1 Cal. 345 (holding that the first subdivision of the Practice Act—Stats. 1850, p. 435, later re-enacted in Code Civ. Proc., § 479—authorizing the arrest of a debtor in certain cases, does not apply in the case of one partner suing another).

9. Ex parte Smith, 53 Cal. 204.

10. Ex parte Perkins, 18 Cal. 60 (holding that the husband is bound to support the wife, and this duty is an obligation which may be enforced by the court, and for failure to pay which, under order of the court, the husband may be arrested and imprisoned. See ALIMONY, vol. 1, pp. 984, 1007, 1057.

had transferred them to him, is not a debt, and is not a case wherein the defendant can be arrested.[11]

§ 20. Cases in Which Authorized—Nature of Remedy.—The Code of Civil Procedure provides that

"No person can be arrested in a civil action, except as prescribed in this code."[12]

And, keeping within the constitutional sanction,[13] the code enumerates the cases in which a defendant may be arrested in civil actions, on mesne or final process.[14] This code also authorizes arrest in actions of forcible entry and detainer, where there is fraud, force or violence in the entry or detainer;[15] against a third person in possession of a will, who refuses to produce it;[16] against an executor or administrator, under various circumstances;[17] against anyone who embezzles money or property from an estate, or conceals property belonging to it;[18] or against a surviving partner, to settle and render an account.[19] A civil arrest may be authorized also to enforce a writ of mandamus,[20] or quo warranto.[1]

Nature of remedy.—An arrest of the defendant in a civil action on mesne process is only an intermediate remedy, designed to secure the presence of the defendant until final judgment.[2] However, the right to arrest a defendant in a civil action commenced in California, for

11. Cooper v. Nolan, 138 Cal. 248, 71 Pac. 179 (holding such a proceeding to be an action in equity to declare a transfer void, for which arrest could only be made on the failure of the defendant to obey).

12. Code Civ. Proc., § 478 (reenactment of section 72 of the Practice Act, substituting the word "code" for "act"); Ex parte Harker, 49 Cal. 465.

13. See supra, § 19.

14. Code Civ. Proc., § 479; and code provisions cited infra.

15. Code Civ. Proc., § 1168.

16. Code Civ. Proc., § 1302.

17. Code Civ. Proc., § 1440 (in proceedings to remove executor or administrator); Code Civ. Proc., § 1575 (for failure to return account of an estate sale); Code Civ. Proc., §§ 1627, 1628, 1630 (to compel an accounting); Code Civ. Proc., § 1451 (to compel an inventory of property delivered after filing original inventory).

18. Code Civ. Proc., § 1460.

19. Code Civ. Proc., § 1585.

20. Code Civ. Proc., § 1097.

1. Code Civ. Proc., § 804.

2. Davis v. Robinson, 10 Cal. 411; Matoon v. Eder, 6 Cal. 57. See

fraud of the defendant, is part of the remedy allowed to the plaintiff by the laws of the state. It is therefore authorized in a case where the cause of action arose in a foreign country, where the fraudulent acts set up as warranting the arrest were committed in that country, and where neither of the litigants are citizens or residents.[3]

§ 21. Affidavit and Order for Arrest Generally.—The Code of Civil Procedure provides as follows:

"The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 479" [of the Code of Civil Procedure].[4]

And it is provided by the same code that

"An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought."[5]

Fraud in contracting the indebtedness should be set forth in the affidavit for arrest required by section 481 of the Code of Civil Procedure.[6] And the affidavit must disclose that a sufficient cause of action exists, and that the case is one of those for which the remedy of arrest is provided.[7] In fact, the jurisdiction to issue an order of arrest in a civil suit rests upon the affidavit. Hence, where the affidavit in an essential particular fails to meet the requirements of the law, the court is without jurisdiction to issue the order.[8]

infra, § 27 et seq., as to arrest in civil cases on final process.

3. Ex parte Howitz, 2 Cal. App. 752, 84 Pac. 229.

4. Code Civ. Proc., § 481 (in part).

5. Code Civ. Proc., § 480; Fkumoto v. Marsh, 130 Cal. 66, 62 Pac. 303, affirming 120 Cal. 316, 52 Pac. 726 (it is necessary to the jurisdiction that an action be pending, but the jurisdiction to make the order rests upon the affidavit). See infra, § 26, as to sufficiency of order.

6. Ex parte Howitz, 2 Cal. App. 752, 84 Pac. 229. And see cases cited infra.

7. See infra, §§ 22 and 23, as to averments of fraud.

8. Ex parte Gillett (Cal. App.), 190 Pac. 209; Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726, affirmed 130 Cal. 66, 62 Pac. 303; Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

Disclosure of fraud must appear by positive averments. It is insufficient to refer to the complaint or any other document not a part of the affidavit to show what the affidavit itself ought to disclose, although it is positively averred that such complaint is true.[9] However, where the complaint actually accompanies and is attached to the affidavit, of which it is made a part by reference, and the affidavit makes oath to the truth of the facts stated in the paper referred to, a cause of action is sufficiently stated.[10] But even though the complaint is set forth in the affidavit, if the affiant does not make oath to the truth of any matters contained therein, the affidavit is insufficient. Where no prosecution for perjury would lie against the affiant predicated on the falsity of any of the matters set forth in the complaint, it cannot be sustained.[11]

Issuance of order by justice of peace.—An order of arrest in a civil action may be issued by a justice of the peace in the manner and upon the conditions prescribed in sections 861 and 868a of the Code of Civil Procedure. It may issue in certain classes of cases, prescribed.[12] Such an order may not, however, be issued from a justice's court for the arrest of any female.[13]

(See "Erratum", 1926 Supp. 192)

§ 22. Averments as to Fraud, Generally—Existence of Cause of Action.—It is a general rule that an affidavit

9. McGilvery v. Morehead, 2 Cal. 607. See infra, § 22.

10. Ligare v. California So. R. R. Co., 76 Cal. 610, 18 Pac. 777; Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135 (stating the rule); Ex parte Howitz, 2 Cal. App. 752, 84 Pac. 229. And see Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726, affirmed 130 Cal. 66, 62 Pac. 303 (questioning the rule, but not deciding). See infra, § 28, as to averments of complaint.

11. Ex parte Gillett (Cal. App.), 190 Pac. 209; Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135 (in this case a statement in the affidavit that "a good and sufficient cause of action exists, as fully appears from the verified complaint on file herein," was held to be a mere statement of the opinion of the affiant. It is not a statement that the matters set forth in the complaint are true.

12. Code Civ. Proc., § 861.

13. Code Civ. Proc., § 861; Nelson v. Kellogg, 162 Cal. 621, Ann. Cas. 1913D, 759, 123 Pac. 1115 (holding that the arrest of a woman on

charging the acts substantially in the language of the statute is sufficiently specific, if the allegations are made upon affiant's own knowledge of the facts.[14] Positive statements contained in an affidavit cannot be disregarded; in fact, they are the evidence which the magistrate granting the order of arrest has the power to consider, and accept as proof of the charge made.[15] The affidavit upon which an order of arrest in a civil action is asked need not state the evidentiary facts upon which the principal fact rests, if instead thereof the affidavit follows the statute and declares in positive terms that such principal fact exists. But this is subject to the qualification that, if the facts stated in the affidavit show that necessarily affiant is acting only on information and belief, then the evidentiary facts must be stated.[16] Even on the most positive statement of personal knowledge, the bare averment that the act was done fraudulently cannot be accepted as a statement of fact in support of an order, when the same statement would constitute an insufficient averment of the fraud in the complaint to recover the money or property claimed to be misappropriated.[17] The existence of fraud in such a proceeding should be determined from the evidence stated, and not as a conclusion of the affiant.[18] Not only must the averments of the affidavit as to the existence of the grounds for arrest be positive, but they must be specific as to the facts of fraud of which the defendant is accused.

civil process under section 861, Code Civ. Proc., is unauthorized).

14. Ex parte La Due, 161 Cal. 632, 120 Pac. 13; In re Keene, 34 Cal. App. 263, 167 Pac. 194; Matter of Caples, 26 Cal. App. 786, 148 Pac. 795.

15. Ex parte La Due, 161 Cal. 632, 120 Pac. 13; Ex parte Howitz, 2 Cal. App. 752, 84 Pac. 229 (applying the rule).

16. Ex parte Gillett (Cal. App.), 190 Pac. 209; In re Keene, 34 Cal. App. 263, 167 Pac. 194. See infra, § 24, as to affidavits on information and belief.

17. Ex parte Gillett (Cal. App.), 190 Pac. 209 (citing Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26; Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016).

18. Ex parte Gillett (Cal. App.), 190 Pac. 209.

Allegations of a general nature are wholly insufficient.[19] It is not necessary, however, that the plaintiff should show positively the actual commission of the fraud. It is sufficient if the circumstances detailed will induce, in a reasonable mind, the belief that a fraud was intended to be perpetrated.[1]

§ 23. Averments of Specific Grounds.—If it appears from an affidavit for arrest in a civil action that the defendant is about to depart from the state with intent to defraud his creditors, a sufficient case is made out to warrant his arrest.[2] But an affidavit for arrest on the ground that the defendant is about to leave the state with intent to defraud his creditors need not, in order to show such intent, aver that the defendant is about to remove any of his effects or property.[3]

The essential of an affidavit for arrest on the ground of having embezzled money is that the misappropriation or conversion occurred in the course of the defendant's employment as agent of the plaintiff. And where the time the alleged misappropriation took place is expressly declared to be unknown, and it is nowhere intimated that the fiduciary relation existed at that time, or that the acts complained of were in the course of his employment, the affidavit is insufficient.[4]

An order for arrest pursuant to section 481 of the Code of Civil Procedure for fraud in contracting the debt or incurring the obligation for which the action is brought has been held to be authorized where the affiant sets forth that the defendant represented himself to be a

19. Ex parte Gillett (Cal. App.), 190 Pac. 209; Plummer v. Brown, 70 Cal. 544, 12 Pac. 464 (stating the rule); Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135.

1. Southworth v. Resing, 3 Cal. 377.

2. Code Civ. Proc., § 479, subd. 1; In re Caples, 26 Cal. App. 786, 148 Pac. 795.

3. Ex parte Bernard, 2 Cal. Unrep. 729, 12 Pac. 487.

4. Code Civ. Proc., § 479, subd. 2; Ex parte Gillett (Cal. App.), 190 Pac. 209.

reputable business man, whereas in fact he was a man of bad repute and was doing business under an assumed name, in order to defraud his creditors, and where other facts show a concealment of property with a fraudulent purpose.[5] An affidavit setting forth that the defendant had removed or disposed of his property, or is about to do so, with intent to defraud his creditors, must show a taking, or attempting to take, the goods or property without the reach of the process or jurisdiction of the court, either territorially or by concealing or disposing of them where they cannot be found and be subjected to attachment. And where the affidavit does not show facts proving a fraudulent intent, or that the property was necessarily taken beyond the reach of process, it is insufficient to authorize an order of arrest.[6] An affidavit for arrest charging that the defendant has made a "pretended sale" of his property is not equivalent to a showing that the defendant had sold his property with intent to defraud his creditors or otherwise, as a "pretended sale," so called, is not a sale.[7]

§ 24. Affidavits on Information and Belief.—The Code of Civil Procedure provides that an affidavit for an order of arrest must be either positive or on information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded.[8] Under this section of the code an affidavit for arrest in a civil action is sufficient if it alleges the fraud on information and belief, provided the facts are stated

5. In re Keene, 34 Cal. App. 263, 167 Pac. 194.

6. Code Civ. Proc., § 479, subd. 5; Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726. It was held in this case that an averment that the defendant "will escape from the state" and thus "defraud and cheat this plaintiff" does not meet the statutory requirement of an averment that the defendant is about "to depart from the state with intent to defraud his creditors."

7. In re Vinich, 86 Cal. 70, 26 Pac. 528.

8. Code Civ. Proc., § 481. As to affidavits generally on information and belief, see AFFIDAVITS, vol. 1, p. 671.

upon which the information and belief are founded.[9] However, the statement of facts upon which an affidavit made on information and belief is founded must, to authorize an order of arrest, be positive and clear, and must be such evidence as would be competent and receivable upon the trial of an action to justify an ordinary judgment for money.[10] Where several of the statements of fact in an affidavit are made on information and belief, and many others, although not so stated in terms, are of a character which in their nature could only have been so made, and the facts upon which such information and belief are founded are in no instance given, the affidavit is insufficient.[11] A warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay.[12] So if the plaintiff himself is not personally cognizant of the facts and circumstances relied upon, he must procure the affidavit of someone who is.[13]

In the justices' courts.—The party applying for an order of arrest in a justice's court must prove to the satisfaction of the justice, upon his own affidavit, or that of another person, the facts necessary to authorize the order.[14] While in the superior court an affidavit for an order of arrest in a civil action may be made on in-

9. Ex parte Gillett (Cal. App.), 190 Pac. 209 (stating the rule); Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860 (stating the rule); Ex parte Howitz, 2 Cal. App. 752, 84 Pac. 229. And see Matoon v. Eder, 6 Cal. 57, for the same rule as it prevailed before the adoption of the code.

10. In re Keene, 34 Cal. App. 263, 167 Pac. 194; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860. See Ex parte Gillett (Cal. App.), 190 Pac. 209, and Peterson v. Nesbitt, 11 Cal. App. 370, 105 Pac. 135, for instances where the affidavit was held to be insufficient.

11. Ex parte Gillett (Cal. App.), 190 Pac. 209 (applying the rule to an affidavit charging fraudulent conversion under Code Civ. Proc., § 479, subd. 4); Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726, affirmed 130 Cal. 66, — Pac. —; Lay v. Superior Court, 11 Cal. App. 558, 105 Pac. 775.

12. Lay v. Superior Court, 11 Cal. App. 558, 105 Pac. 775; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

13. Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

14. Code Civ. Proc., § 862; Ex parte La Due, 161 Cal. 632, 120 Pac. 13.

formation and belief, provided the evidentiary facts are set forth,[15] such an affidavit is not competent to serve as a basis of an order of arrest in a justice's court. An order for arrest in that court cannot rest on anything less than proof; and it has been said " 'Information and belief' is not proof."[16]

§ 25. Issuance and Validity of Order of Arrest—Discharge on Habeas Corpus.—The statutes provide that the "defendant" in a civil action may be arrested in a certain class of cases. Until there is a suit instituted, there cannot, of course, be a defendant, and consequently no authority, under the law, to issue an order of arrest. Thus, it has been held that if no action has been instituted at the time of issuing the order, such order is void for want of jurisdiction.[17] The power of the court to issue an order is governed by the facts and conditions which were made to appear to the judge by the affidavit pursuant to which the order was made. It cannot rest upon developments at some subsequent stage of the proceedings when, possibly, facts would be established justifying this action. And if, on making a motion to vacate an order of arrest, evidence is adduced sufficient to justify making the order, the facts thus established cannot have a retroactive effect in conferring jurisdiction to make the order, when the first affidavit, on which the order was based, was insufficient.[18] In this connection Mr. Justice Field has said:

"In nearly every case in which an arrest is allowed by the statute, the facts authorizing the arrest also constitute the cause of the action, and, of course, must necessarily be stated in the complaint. In the few instances where the circumstances authorizing an arrest occur subsequently to the filing of the complaint, application should be made

15. See supra, this section.

16. In re Vinich, 86 Cal. 70, 26 Pac. 528.

17. Code Civ. Proc., § 479; Ex parte Cohen, 6 Cal. 318 (under the Practice Act).

18. Lay v. Superior Court, 11 Cal. App. 558, 105 Pac. 775.

to the court either to amend the original, or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the enforcement of the judgment sought. By requiring the charges to be stated in the complaint, the rights of the defendant will be fully guarded. He can then meet the charges, and have a fair opportunity of defending himself by a trial before the jury.' "[19]

An order of arrest in a civil action is not void because the complaint in the action does not charge the defendant with fraud.[20] However, such an order is defective if it does not state that the arrest is in a case authorized by law. There is no presumption that the judge issued the order in one of the cases in which he was authorized to issue it. The liberty of the citizen cannot be presumed away in such a manner.[1]

Discharge on habeas corpus.—It was declared in an early case that the insufficiency of an affidavit upon which an order is based cannot be set up by third parties, or even by the defendant himself after judgment, the reason being given that if a defendant in such an action gives bail and neglects to move to be discharged from arrest, he thereby consents to the process and waives all irregularities in the affidavit.[2] And under the early practice it has also been held that the sufficiency of an affidavit for arrest in a civil action could not be examined into on habeas corpus.[3] But under the rule as it is now understood, it would seem that if the court is without jurisdiction to issue an order of arrest in a civil action, the defendant is entitled to his release on habeas corpus. Hence, it has been ruled that a defendant in a civil action held in custody under an order of arrest, based

19. Davis v. Robinson, 10 Cal. 411.

20. Ex parte Howitz, 2 Cal. App. 752, 84 Pac. 229.

1. See supra, § 20, as to cases where arrest in civil actions is authorized. And see In re Waldron, 1 Lab. (Cal.) 2, holding an order insufficient which simply stated that the same was one of those mentioned by statute. And see In re Hoe, 1 Lab. (Cal.) 204.

2. Matoon v. Eder, 6 Cal. 57.

3. In re Waldrou, 1 Lab. (Cal.) 2.

upon an insufficient affidavit, will be discharged on habeas corpus.[4] However, if evidence has been presented to the judge ordering the arrest, and passed upon by him, the validity of his order of arrest cannot be doubted, and conflicting evidence on the issue of fraud cannot be reviewed, in a petition by the person arrested for a writ of habeas corpus.[5]

§ 26. Execution of Order of Arrest—Vacation of Order.—The order for the arrest in a proper case may be made at the time of the issuing of summons, or any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.[6]

The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order.[7] It is the duty of the sheriff to execute the order by arresting the defendant and keeping him in custody until discharged by law,[8] discharge being accomplished by giving bail or depositing the amount mentioned in the order of arrest.[9] An order which is signed by the judge issuing it, and otherwise complies with the requirements of section 481 of the Code of Civil Procedure, is not process, and need not, consequently, be issued in the name of the people of the state of California.[10]

The defendant arrested may, at any time before the trial of the action, or, if there be no trial, before the entry

4. In re Vinich, 86 Cal. 70, 26 Pac. 528.

5. Ex parte La Due, 161 Cal. 632, 120 Pac. 13. See infra, § 29, as to discharge from arrest on final process. And see generally, HABEAS CORPUS.

6. Code Civ. Proc., § 483.

7. Code Civ. Proc., § 484.

8. Code Civ. Proc., § 485.

9. Code Civ. Proc., § 486. See BAIL AND RECOGNIZANCE.

10. Dusy v. Helm, 59 Cal. 188.

to the court either to amend the original, or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the enforcement of the judgment sought. By requiring the charges to be stated in the complaint, the rights of the defendant will be fully guarded. He can then meet the charges, and have a fair opportunity of defending himself by a trial before the jury.' "[19]

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6. Code Civ. Proc., § 483.

7. Code Civ. Proc., § 484.

8. Code Civ. Proc., § 485.

9. Code Civ. Proc., § 486. See BAIL AND RECOGNIZANCE.

10. Dusy v. Helm, 59 Cal. 188.

of judgment, apply to the judge who made the order, or to the court in which the action is pending, upon reasonable notice, to vacate the order of arrest. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.[11] If, upon such application, it appears that there was not sufficient cause for the arrest, the order must be vacated.[12]

On Final Process.

§ 27. Execution Against the Person Generally.—There was no provision in the Practice Act, and there is none in the Code of Civil Procedure, which expressly authorizes an execution against the person; but the third subdivision of section 682 of the Code of Civil Procedure,[13] provides that

"If it [the execution] be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor, and commit him to the jail of the county, until he pay the judgment, with interest, or be discharged according to law."

Execution against the person has been allowed from the organization of the courts in California to the present time. There is no valid objection to the courts ordering an execution against the person of the defendant adjudged guilty of fraud. While it is true that section 478 of the Code of Civil Procedure provides that "No person can be arrested in a civil action, except as prescribed in this code,"[14] this provision has reference to mesne and not final process. It would be an absurd provision of the law to authorize the arrest of a

11. Code Civ. Proc., § 503.
12. Code Civ. Proc., § 504.
13. The code section referred to in the text is a re-enactment of section 210, subdivision 3, of the Practice Act.
14. See supra, § 20.

party upon being accused of a fraudulent act, and to require his discharge upon being found guilty.[15]

It is a general principle that an execution must be warranted by the judgment, and if it exceeds the judgment, it has no validity.[16] Therefore, to authorize an arrest of the person of the defendant on execution, it has been said that a special finding on the question of fraud should always be taken so as to keep it as distinct as possible from the main subject of controversy. The fraud must be stated in the judgment, for the writ of execution in the language of the statute is the "enforcement" of the judgment.[17] Thus, where fraud is alleged in an action on a money demand which, if proven, would have justified a judgment for the arrest and detention of the defendant until the money judgment should be paid, and the jury returns a general verdict for the money, and a special verdict against the existence of fraud, the special verdict is not inconsistent with the general verdict. If the plaintiff fails to prove the fraudulent act, the verdict should be for the defendant on that issue, even though in favor of the plaintiff on the issue of the money demand.[18]

§ 28. **Proof of Fraud.**—It is clear that in a civil action in which the arrest of the defendant is sought, there can be no departure from the rule that fraud is a fact which must be proved; and to be proved, the facts upon which the charge is based must be specifically alleged.[19] Fraud

15. Stewart v. Levy, 36 Cal. 159.

16. Davis v. Robinson, 10 Cal. 411. And see generally, EXECUTIONS.

17. See Code Civ. Proc., §§ 681, 685; Portland Cracker Co. v. Murphy, 130 Cal. 649, 63 Pac. 70; Davis v. Robinson, 10 Cal. 411, (holding that a general verdict found for the plaintiff does not amount of itself to a finding against the defendant on the issue of fraud); Matoon v. Eder, 6 Cal. 57 (under the Practice Act).

18. Portland Cracker Co. v. Murphy, 130 Cal. 649, 63 Pac. 70.

19. Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80; Davis v. Robinson, 10 Cal. 411; Matoon v. Eder, 6 Cal. 57.

is never presumed.[20] Even when an order of arrest in a civil action issues from a court having jurisdiction over frauds, fraud will not be presumed on the theory that the order has been issued in a proper case. The liberty of the citizen is not to be presumed away in any such manner.[1] Following the general rule above stated, it has been held that a judgment authorizing the arrest of the defendant, without any issuable averments in the pleadings on the subject, should be vacated.[2]

§ 29. Discharge from Arrest—Second Arrest.—The Code of Civil Procedure provides that any person confined in jail, on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions prescribed in the code.[3] It is then provided that such person must give notice to the plaintiff or his attorney that he will apply for discharge, at a certain time and place, to a judge of the superior court of the county where he is confined.[4] This notice must be served on the plaintiff or his attorney at least one day prior to the hearing.[5] At the hearing the defendant must be examined as to his estate and property, and his ability to pay the judgment; and any other legal and pertinent evidence may be taken.[6] If the defendant then takes oath that he has no property to satisfy the judgment, he must be released.[7] In determining the ability of the defendant to pay in such a case, his former bad conduct is immaterial. If the oath he takes that he has no prop-

20. Davis v. Robinson, 10 Cal. 411; Matoon v. Eder, 6 Cal. 57. See generally, FRAUD AND DECEIT.

1. Matoon v. Eder, 6 Cal. 57.

2. Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80.

3. Code Civ. Proc., § 1143; Spencer v. Lawler, 79 Cal. 215, 21 Pac. 742; In re Wilson, 75 Cal. 580, 17 Pac. 698.

4. Code Civ. Proc., § 1144.

5. Code Civ. Proc., § 1145.

6. Code Civ. Proc., §§ 1146, 1147.

7. See Code Civ. Proc., § 1148 (setting forth the form of the oath); § 1149 (as to the order of discharge); § 1150 (providing for subsequent hearings where defendant is not discharged). See Matoon v. Eder, 6 Cal. 57 (stating the rule under the Practice Act); and In re Aram, 1 Lab. (Cal.) 239.

erty is untrue, perjury is committed; and if he has property, it can be taken in execution. His oath, therefore, is entitled to great weight, and, it is said, should discharge him, despite the assertions of creditors that he has property which he is concealing.[8]

Section 1184 of the Code of Civil Procedure requires the plaintiff in execution, who has caused the defendant to be arrested in a civil action, to advance to the jailer moneys sufficient for the support of the defendant while in jail, for one week, and also to make a similar weekly advance for the same purpose during the imprisonment, and provides that in case of the failure of the plaintiff to do so, the defendant must be discharged from custody by the jailer. The failure on the part of the plaintiff to comply with these requirements of the statute does not, per se, operate a discharge of the defendant. If he be adequately supported by the jailer, and the latter is willing to trust the creditor for reimbursement, the purpose of the statute is satisfied.[9]

A person, after discharge, is forever exempted from arrest or imprisonment, in the same action for the same debt.[10] Thus, where a defendant in divorce proceedings arrested and imprisoned for failure to pay alimony and counsel fees, is discharged, and is subsequently arrested and imprisoned for nonpayment of the same sums, such second arrest is illegal, and the defendant will be discharged on habeas corpus.[11]

VI. LIABILITY FOR MAKING OR CAUSING ARREST.

§ 30. Wrongful Arrest Generally.—The rules governing actions for false imprisonment, malicious prosecution, and abuse of process fully cover the liability of a

8. In re Aram, 1 Lab. (Cal.) 239.
9. Ex parte Lamson, 50 Cal. 306.
10. Ex parte Batchelder, 96 Cal. 233, 31 Pac. 45; McGilvery v. Morehead, 2 Cal. 607; Code Civ. Proc., § 1151.
11. Ex parte Batchelder, 96 Cal. 233, 31 Pac. 45.

person for causing or being a party to a wrongful arrest, and the actions allowed as remedies therefor. It is proposed here to discuss only the general principles of liability in executing process, or arresting without warrant.[12] It is provided by the Penal Code that every public officer or person pretending to be a public officer, who, "under the pretense or color of any process or other legal authority, arrests any person or detains him against his will . . . , is guilty of a misdemeanor."[13] The general rule is that one who arrests the person of another by legal process or other equivalent authority conferred upon him by law, can justify himself only by a strict compliance with the requirements of such process or authority. If he fails to execute a return of the process as thereby required, or to do what the law requires him to do in making the arrest, his whole justification fails. Regular process or authority affords no justification for doing a wrongful act, not authorized by the process. An officer making an arrest in his own county, for an offense triable in another county, must take the person arrested before a magistrate of the county where the offense is triable.[14] If an officer arrests a person in good faith, under such circumstances, intending to take him before a magistrate, in obedience to the warrant, he is not liable for any wrong, even though after taking the person arrested to another county he unlawfully placed him in an insecure place, and thereby allowed him to escape. But if the arrest is not made in good faith, and such person is taken into another county without any intention of taking him before the magistrate issuing the warrant, and he is not in fact taken before any magistrate, then the officer is guilty of a wrongful act.[15]

In arresting without warrant for a felony, upon reasonable grounds, a person cannot be held liable should the

12. See the suggested topics: FALSE IMPRISONMENT;. MALICIOUS PROSECUTION; PROCESS.

13. Pen. Code, § 146.

14. See supra, § 18.

15. People v. Fick, 89 Cal. 144, 26 Pac. 759.

arrest be subsequently shown to be improper.[16] But a peace officer who makes an arrest without warrant when he is not authorized so to do, as, for example, for a misdemeanor not committed in his presence, will be held liable.[17]

An officer who uses excessive and unnecessary force in making an arrest will be liable on his official bond for damages caused thereby to the person arrested.[18] It has been held that a defendant in an action commenced in a justice's court, who has been arrested and subsequently discharged by the justice of the peace, cannot maintain an action on the undertaking given to procure his arrest while an appeal to the superior court from the judgment of the justice's court remains undetermined.[19]

§ 31. Responsibility for Causing Arrest—*In civil action.*—An order of arrest which is regular on its face, and issued by a competent authority, protects the officer whose duty it is to execute it, and will likewise protect the party who procured it. If the judge to whom an application is made to arrest the defendant in a civil action has jurisdiction to pass upon the sufficiency of the evidence disclosed by the affidavit to procure the order of arrest, the party applying for it cannot be held responsible unless there was an entire lack of evidence of some essential fact which the law requires to be shown. And where the affidavit is submitted to the judge, and he holds that in point of evidence there is grounds for arrest, and directs the issuance of the order for the arrest, the party applicant is protected.[20] This rule is not ap-

16. Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43.

17. Ex parte Dillon (Cal. App.), 186 Pac. 170. See supra, § 4.

18. Towle v. Mathews, 130 Cal. 574, 62 Pac. 1064. See supra, § 12.

19. Stechhan v. Roraback, 67 Cal. 29, 7 Pac. 7.

20. Dusy v. Helm, 59 Cal. 188.

plicable, however, to an action brought in a justice's court, wherein it was sought to arrest a female. Such an arrest is not allowed under any state of facts, and the magistrate is without jurisdiction to order the arrest. The person causing it may, therefore, in such a case, be held responsible.[1]

On criminal charge.—It is the rule in California that the advice of a justice of the peace, upon the facts stated to him by the complainant alleging that a crime had been committed, and upon which he issued a warrant of arrest, is sufficient to exonerate the complainant from liability for the arrest, if he acted honestly and in good faith under that advice.[2] On the same principle a complainant will be exonerated from liability if he acted under the advice of counsel, subject to the qualification that to justify the arrest under such circumstances the complainant must have made to his counsel a full and true statement of all material facts known to him, or which he had the means of ascertaining. And if he had reasonable grounds for believing that other facts existed which would tend to exculpate the person accused, good faith requires that he should make inquiry in reference to them, or that he should disclose his belief to his counsel, that his counsel might take them into consideration in formulating his opinion.[3] Good faith requires also that the complainant should believe that the person he charges with crime, and causes to be arrested, is actually guilty. While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the complainant had reasonable ground to believe, but that he did

1. Nelson v. Kellogg, 162 Cal. 621, Ann. Cas. 1913D, 759, 123 Pac. 1115. See supra, § 21; and see Code Civ. Proc., § 861.

2. Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; Hahn v. Schmidt, 64 Cal. 284, 30 Pac. 818.

3. Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463. See MALICIOUS PROSECUTION.

in fact believe, that the crime had been committed, and that the person charged had committed it.[4]

4. Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; Harkrader v. Moore, 44 Cal. 144; Fleischhauer v. Fabens, 8 Cal. App. 30, 96 Pac. 17.

(E. K. S.)

ARREST OF JUDGMENT.

See CRIMINAL LAW; JUDGMENT.

ARSON.

I. INTRODUCTORY.
II. INDICTMENT AND INFORMATION.
III. EVIDENCE.
IV. TRIAL, VERDICT AND PUNISHMENT.

I. Introductory.

1. Scope of Article.
2. Definitions, Degrees and Elements of Crime.
3. Character of Building.
4. What Constitutes Burning.
5. Ownership and Occupancy of Building.

II. Indictment and Information.

6. In General.
7. Various Essential Averments.
8. Ownership and Possession.

III. Evidence.

9. Proof of Other Offenses or Attempts.
10. Evidence as to the Burning.
11. Admissions and Confessions.
12. Intent and Motive.
13. Circumstantial Evidence.

IV. Trial, Verdict and Punishment.

14. Burden of Proof, Reasonable Doubt.
15. Proof of Corpus Delicti.
16. View of Place.
17. Verdict and Punishment.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 194 Pac.

I. INTRODUCTORY.

§ 1. Scope of Article.—The subject covered by this article is arson as defined by the chapter on arson in the Penal Code. Setting fire with intent to defraud an insurance company as that offense is defined under section 548 of the Penal Code, and burnings of structures not the subject of arson, as contemplated by section 600 of that code, are treated elsewhere in this work.[1] However, if certain acts constitute arson in all other respects, the crime committed is arson, whether the motive be to defraud an insurance company, gain, revenge, or such as actuates the commission of any kind of malicious mischief. Section 548 of the Penal Code, which deals with the burning of property insured with intent to defraud the insurer, does not undertake to change the character of the crime of arson; its purpose is to prevent the fraudulent destruction of property insured. Arson is the same crime that it was before that section was enacted. It is therefore apparent that although a burning may render the offender liable under an indictment for destruction with intent to defraud an insurer, a prosecution may, nevertheless, be had for arson under the general statute, all the elements of such offense being present.[2]

§ 2. Definitions, Degrees and Elements of Crime.—The Penal Code defines arson as, "the willful and malicious burning of a building, with intent to destroy it."[3] The crime is divided into two degrees,[4] which are thus defined:

"Maliciously burning in the night-time an inhabited building in which there is at the time some human being, is arson in the first degree. All other kinds of arson are of the second degree."[5]

1. See infra, § 2, for definitions and distinctions; and see FIRES; MALICIOUS MISCHIEF.

2. People v. Fong Hong, 120 Cal. 685.

3. Pen. Code, §447.

4. Pen. Code, § 453.

5. Pen. Code, § 454. See infra, § 17, as to punishments.

The phrase "night-time," as used in the code, means the period between sunset and sunrise;[6] and an "inhabited building" within the meaning of the code is "any building which has usually been occupied by any person lodging therein at night."[7]

At common law arson was the malicious or willful burning of the dwelling-house of another;[8] and the crime has always been regarded as essentially an offense against the security of the dwelling or habitation, rather than against the property.[9] But under the code it is not essential to the offense that the building burned be owned by a person other than the accused. A rightful occupancy or possession thereof in another person is sufficient. Conversely, however, the crime may be committed as at common law, where the building burned is owned by another than the person rightfully in possession, as, for example, where it is burned by a tenant.[10]

Malice and intent.—There must be, to constitute the crime of arson, a willful and malicious burning of the building, and, as provided in the code definition, there must be intent to destroy it.[11] Malice, as applied to this crime and within the meaning of the law generally, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive.[12]

§ 3. Character of Building.—The Penal Code defines the word "building" as used in the chapter relating to arson as "Any house, edifice, structure, vessel, or other erection, capable of affording shelter for human beings,

6. Pen. Code, § 450.

7. Pen. Code, § 449. See infra, § 3, as to the building generally.

8. People v. De Winton, 113 Cal. 403, 45 Pac. 708. See 2 Ruling Case Law, p. 496.

9. People v. De Winton, 113 Cal. 403; People v. Fisher, 51 Cal. 319.

10. See infra, §§ 5, 8.

11. People v. Fong Hong, 120 Cal. 685. Cited in People v. Mooney, 127 Cal. 339.

12. People v. Daniels, 4 Cal. Unrep. 248. Malice is defined in the Penal Code, as a "wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." Pen. Code, § 7, subd. 4. See CRIMINAL LAW.

or appurtenant to or connected with an erection so adapted."[13] Under this definition, a yard in which a warehouse is alleged to have been set on fire should be regarded prima facie as "appurtenant to, or connected with," the warehouse, and therefore within the definition of the word "building." And a yard being so appurtenant to, or connected with, the warehouse, the setting of it on fire is arson.[14]

It is not necessary that the "house, edifice, structure, vessel, or other erection" should have been intended for, or have been used as, a habitation; but it is sufficient as the code prescribes, if it be "capable of affording shelter for human beings." And so it has been said:

"It is not true that the willful and malicious burning of a building, which was not intended, or was not used, as a habitation, is an offense against the person rather than against the property."[15]

§ 4. What Constitutes Burning.—According to the code,

"To constitute a burning, it is not necessary that the building set on fire should have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the substance of the building."[16]

If the wood is blackened, but no fibers are wasted, there is no burning. Yet the wood need not be in a blaze. And the burning of any part, however small, completes the offense.[17] Where a spot on the floor is charred, and the fibers of the wood are destroyed by the fire set, this constitutes "burning."[18] So where the wooden partition

13. Pen. Code, § 448.

14. Clugston v. Garretson, 103 Cal. 441 (action for slander for words charging plaintiff with having "set fire to a yard").

15. People v. Fisher, 51 Cal. 319 (per Rhodes, J.).

16. Pen. Code, § 451.

See note, 1 A. L. R. 1163, as to burning as an element of the offense of arson.

17. People v. Simpson, 50 Cal. 304; People v. Haggerty, 46 Cal. 354.

18. People v. Haggerty, 46 Cal. 354 (cited in Woolsey v. State, 30

in a house is charred and in one place burned through, there is sufficient burning to come within the definition.[19] The malicious setting of fire to a wine cellar by the defendant, which caused the flames to be communicated from the wine cellar to a dwelling-house near by, and which necessarily caused the house to take fire and be consumed, would constitute a burning of the dwelling within the law of the crime of arson, although the jury could not find the defendant guilty of arson for setting fire to the cellar, because that was not included in the charge.[20]

§ 5. Ownership and Occupancy of Building.—The code provides as follows:

"To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying such building, or any part thereof."[1]

Under this code provision, to be the subject of arson, the building must be, at least, the qualified property of another—must be, at least, rightfully in the possession or occupancy of another at the time of the offense. Therefore a man who burns a building of which he himself was owner, when there is no averment that at the time of the burning another person was rightfully in possession of, or was actually occupying such building, or any part thereof, cannot be convicted of arson.[2] And, in the

Tex. App. 349, but ruling aliter where the building was merely scorched).

19. People v. Simpson, 50 Cal. 304.

20. People v. Hiltel, 131 Cal. 577.

1. Pen. Code, § 452.

2. People v. De Winton, 113 Cal. 403, 52 Am. St. Rep. 357, 33 L. R. A. 374, 45 Pac. 708 (holding that section 452 of the Penal Code is manifestly a limitation upon the sweeping terms of section 447 of that code). See Clemens v. State (Okl.), 137 Pac. 1100, for a discussion of the De Winton case, supra, and the California code provisions above cited and referred to, and for similar holdings under like provisions of the Oklahoma statute.

absence of such an averment, this is the rule even though the burning endangered the lives of inhabitants of other buildings.[3] If, however, the owner burns his own building and another person is rightfully in possession of, or is actually occupying such building, the owner is guilty of arson.[4] When the building burned by a defendant was occupied by third parties, the defendant cannot urge a presumed license from the owner to burn it, the owner himself having no such right, nor does it lie within his power to give a license to do so.[5] The tenant of a building owned by another and occupied solely by himself may be guilty of arson in burning the building.[6]

In arson in the first degree.—To constitute arson in the first degree the presence of "some human being" in the building at the time of the burning is obviously essential. And it is just as clear that it must be some human

See supra, § 2, for the wording of Pen. Code, § 447; and see as to indictment or information, infra, § 8.

3. People v. De Winton, 113 Cal. 403, 45 Pac. 708 (stating, however, by way of dictum that the charge that the burning endangered the lives of others might make the indictment good as a charge of an attempt to commit arson).

Under the common law a person was not guilty of arson in willfully burning his own house, unless the house of another was thereby burned; and this, even though the burning of his own house was with intent to destroy his neighbor's house. 4 Black. Com., Wendell's Ed., 221 (cited in People v. De Winton, supra).

4. People v. Davis, 135 Cal. 162; People v. Wooley, 44 Cal. 494. See People v. Scott, 32 Cal. 200, holding that on a trial for arson, charged to have been committed by burning a building owned by a person named and in which he was residing, if no question is made by the defendant as to the right of such person to the possession of the land on which the building stood, testimony as to its ownership is irrelevant.

5. People v. Fong Hong, 120 Cal. 686. See People v. De Winton, 113 Cal. 403, where it is said that the right to destroy one's own dwelling is doubtless founded upon the right which the law accords to a man of making such use of his property as he may see fit, so long as others are not thereby injured.

6. People v. Abrams, 174 Cal. 172; People v. Handley, 100 Cal. 370, 34 Pac. 853; People v. Simpson, 50 Cal. 304; People v. Abrams, 174 Cal. 172, 162 Pac. 395; People v. Principe, 23 Cal. App. 729. See supra, § 2, for definition of first degree arson, and as to meaning of "inhabitable building" as that term is used in the code.

being other than the person or persons doing the forbidden act.[7] Thus a defendant jointly charged with another but separately tried cannot be convicted of arson in the first degree, if the evidence shows that they were both participants in the burning and fails to show the presence of any other person in the building.[8]

II. INDICTMENT AND INFORMATION.

§ 6. In General.—An indictment or information for arson, in conformity with the principles applicable to the charging of offenses generally,[9] must clearly show the venue of the offense; the intent to destroy; and it must also allege a burning of the property.[10] Furthermore, it must sufficiently describe the building or property burned;[11] and, except as the rule of the common law is altered by statute, it must aver the ownership thereof.[12]

An information or indictment for arson drawn substantially in the language of the statute which defines the offense is sufficient;[13] and this is the rule also where an attempt to commit arson is charged.[14] Thus, an information alleging (following the formal and necessary averments) that the "defendant did in the night-time of said day willfully, maliciously, and feloniously attempt to burn, with intent then and there to destroy, a building," the property of, etc., is sufficient, in that the offense is stated in accordance with the language of section 447 of the Penal Code. It is not necessary to set forth the definitions in sections 448 to 452, since these sections relate to the

7. People v. Abrams, 174 Cal. 172, 162 Pac. 395. See supra, § 2, as to degrees of arson.

8. People v. Abrams, 174 Cal. 172.

9. See INDICTMENT AND INFORMATION.

10. See infra, § 7.

11. See infra, § 8; and supra, § 5.

12. See infra, § 8.

13. People v. Russell, 81 Cal. 616 (charging arson in the first degree); People v. Schwartz, 32 Cal. 160 (where the indictment was for burning an insured building with intent to defraud).

14. People v. Giacamella, 71 Cal. 48.

circumstances of the commission of the crime;[15] nor is it necessary to insert in the indictment the statutory appellation of the crime, where the facts constituting the offense are sufficiently stated to give explicit information thereof;[16] nor is it necessary in such case to state in what degree the crime was committed. That is for the jury to determine from all the facts and circumstances developed in evidence.[17] Where the indictment charges the burning of two or more buildings, it does not necessarily charge more than one offense.[18]

§ 7. Various Essential Averments—*Venue.*—The indictment should clearly show that the offense was committed somewhere in the jurisdiction of the court in which the action is brought. However, an indictment which, after alleging the place and time of the offense, shows that the defendant then and there being in the county in which the indictment was found, then and there burned the property, is sufficient, since it can be understood that the offense was committed at some place within the jurisdiction of the court.[19]

Intent to destroy.—The intent to burn, like everything else which the law has made an element of the offense, must be alleged; for otherwise no prima facie case appears.[20] Thus, an information which avers that the defendant did "willfully, unlawfully, feloniously, and maliciously set fire to and cause to be burned a certain building," is insufficient to charge the crime of arson, in that "intent to destroy" is omitted.[1]

The "burning."—Although common law indictments employed the words "set fire to" and "burn" in charging

15. People v. Russell, 81 Cal. 616; People v. Giacamella, 71 Cal. 48.

16. People v. Phipps, 39 Cal. 326 (citing and applying Crim. Prac. Act, §§ 237, 238, 246, 247).

17. People v. Russell, 81 Cal. 616.

18. People v. Phipps, 39 Cal. 326.

19. People v. Wooley, 44 Cal. 494.

20. People v. Mooney, 127 Cal. 339; Pen. Code, § 447.

1. People v. Mooney, 127 Cal. 339. Approved in People v. Mooney, 132 Cal. 13.

the offense,[2] under the code it is not necessary to state in terms that the defendant "set fire to" the dwelling-house, although the use of the expression is usual. The words "set fire to" are not a part of the definition of the offense by the statute, and an averment that the defendant "feloniously, willfully and maliciously did burn, and cause to be burned," is sufficient.[3] Neither is it necessary to allege that the building was consumed or destroyed by fire, since destruction is not an essential element under the code definition.[4] An indictment which contains the disjunctive allegations that the defendant burned or caused to be burned is bad for uncertainty, since where the statute enumerates several acts disjunctively, which separately or together constitute the offense, the indictment, if it charges more than one of them, should do so in the conjunctive.[5]

§ 8. Ownership and Possession.—The general rule in regard to the necessity for stating the ownership of the premises is, that if the information contains a description of the house alleged to have been burned, sufficient to identify it, regardless of the name of the owner, the ownership of the house, although alleged in the information, becomes immaterial.[6] Accordingly, in an indictment in which the house burned is already sufficiently described, a failure to prove the ownership as alleged by the indictment is immaterial, since such ownership, if

2. 2 Ruling Case Law, p. 510.

3. People v. Myers, 20 Cal. 76 (citing authorities to similar effect from Massachusetts and New Jersey under statutes similar to that of California); People v. Myers, supra, overrules People v. Hood, 6 Cal. 236, to the extent of holding that the indictment need not aver in terms that defendant "set fire to" the dwelling.

4. Clugston v. Garretson, 103 Cal. 441. See supra, § 2, for the statutory definition of the offense. See supra, par. 4, as to what constitutes a "burning."

5. People v. Hood, 6 Cal. 236 (overruled on another point—see supra, this section). See, also, INDICTMENTS AND INFORMATIONS.

6. People v. Davis, 135 Cal. 162; People v. Handley, 100 Cal. 370; People v. Taverty, 9 Cal. App. 756; Pen. Code, §§ 447–449, 452.

proven, would only further identify the house burned.[7] It has been held that an indictment which describes the building burned as the property of the defendant, and fails to aver its occupancy or possession by anyone, does not charge arson. In such case the presumption is that it was in the possession and occupancy of the owner. Nor is the pleading in any way aided in this respect by an averment that the house was so situated that the burning thereof endangered the lives of inhabitants of other dwellings. While such an averment might make the indictment good as a charge of attempt to commit arson, it does not help out the statement of the principal offense.[8]

Building in possession of tenant.—When the ownership or possession of the building burned is averred in the indictment, it is not necessary to describe the building as the building of the occupant or tenant. It is sufficient to describe it as the building of the owner, though it may have been held by a tenant, under lease from the owner.[9] In any event, the indictment or information should be certain in its allegations and not aver that the house burned was the property of one person and the dwelling-house of another. Such an information does not distinctly inform the defendant whose house he is accused of burning.[10]

7. People v. Shainwold, 51 Cal. 470; People v. Lee Hung, 2 Cal. Unrep. 226.

8. People v. De Winton, 113 Cal. 403, 45 Pac. 708. In People v. Myers, 20 Cal. 76, which arose under the statute as it existed prior to the code (1 Hittell's Gen. Laws, § 1557), where the definition of arson in the first degree was, like section 447 of the Penal Code, wholly silent as to the ownership of the burned building, the court, in considering an objection to the sufficiency of the averment as to the ownership of the property, said: "It is essential that the indictment should show that the building burned is the property of another. (East's Pleas of the Crown, 1034.) And this was so held where the statute, like ours, did not say so in terms. (People v. Gates, 15 Wend (N. Y.) 159.) The allegation of the ownership of the building burned is a part of the description of the offense." See supra, § 5.

9. People v. Fisher, 51 Cal. 319; People v. Simpson, 50 Cal. 304.

10. People v. Myers, 20 Cal. 76.

III. EVIDENCE.

§ 9. Proof of Other Offenses or Attempts.—In conformity with the general rule, proof of after-committed offenses is not admissible in support of the charge of arson.[11] However, it is competent for the prosecution to prove previous attempts of the defendant to set fire to the building, as such evidence bears directly upon the intent of the prisoner in subsequently setting fire to it.[12] And it may be shown that the defendant burned a building of the prosecuting witness other than the one referred to in the indictment, when the evidence shows that the previous burning was actuated by a motive similar to the motive leading to the burning with which the defendant is charged.[13] Although the information charges the defendant with having burned only one building, and fails to connect him with the burning of other buildings which were burned at the same time, it is competent to show the contents of the other buildings, and to show that all were apparently fired simultaneously.[14]

§ 10. Evidence as to the Burning.—Evidence of all the facts which tend to show that the fire was of incendiary origin may be introduced. Hence, where a person is accused of burning a saloon, evidence is admissible that the fire, when first discovered was behind the bar; that a few minutes later, after an entrance was effected, the fire had spread over all the bar, and that the room was stifling with coal-oil fumes; and that, after the fire had been put out, the walls, floor and furniture were found to be cov-

11. People v. Wilkinson, 30 Cal. App. 473 (where the defendant was charged with having set fire to a pile of baled hay, the property of another, as that offense is defined by Pen. Code, § 600). As to proof of other crimes generally, see CRIMINAL LAW.

12. People v. Lattimore, 86 Cal. 403; People v. Shainwold, 51 Cal. 468.

13. People v. Lattimore, 86 Cal. 403.

14. People v. Hiltel, 131 Cal. 577.

ered with oil.[15] Similarly, evidence of the contents of a bottle found the morning after the fire on the floor under a woodshed, near the place where the fire occurred, and the bottle itself, may be introduced into evidence to show the incendiary character of the fire.[16] And in order to connect the defendant with the burning, evidence may be introduced to show that there was the odor of coal-oil on his clothes at the time of his arrest, when it has already been proved that shortly after the outbreak of the fire, the floors and furniture were found saturated with oil.[17] But evidence which will rebut the theory that the fire was of incendiary origin is admissible, such as evidence that rubbish was seen burning the day previous to the fire, in the yard of the building burned.[18]

Photographs, taken a few hours after the fire, showing the appearance of the building at the time the photographs were taken, may be introduced when the conditions illustrated are corroborative of the testimony of witnesses showing what they found on the premises at and after the fire.[19]

Evidence of experiments is admissible within the discretion of the court. However, the result of an experiment is not to be regarded as conclusive, but a mere circumstance to be considered in connection with the other evidence in the case and its weight is for the jury to determine.[20]

Evidence of the burning of a building other than that described in the indictment is admissible where such evidence tends to show that the building alleged to have been burned would inevitably be destroyed through the firing of such other building. And so, it has been held competent to show that a cellar and a tank-house and a dwelling were apparently fired simultaneously, although

15. People v. Levine, 85 Cal. 39.

16. People v. Fitzgerald, 137 Cal. 546.

17. People v. Bishop, 134 Cal. 682.

18. People v. Fournier, 5 Cal. Unrep. 620.

19. People v. Barbera, 29 Cal. App. 604.

20. People v. Levine, 85 Cal. 39.

the information charged the defendant with burning the dwelling, and did not include the other two buildings.[1]

§ 11. Admissions and Confessions.—The rule is well established that a conviction for arson cannot be had on the extrajudicial confessions of the defendant, unless corroborated by proof aliunde of the corpus delicti;[2] but it is not necessary that the evidence of the corpus delicti should itself connect the defendant with the perpetration of the crime in order to make the confession admissible.[3] However, mere proof of the destruction of a building by fire is not enough to establish the corpus delicti, and the defendant's extrajudicial statements and admissions are not sufficient in themselves to sustain a judgment of conviction for arson.[4]

Admissions and confessions of accomplices may be admitted in evidence, if there is sufficient independent corroborative evidence of such admissions, where they tend to show the incendiary character of the fire, and facts and circumstances pointing to defendants' connection therewith.[5] Where the buildings are in fact burned, and the circumstances tend in some degree to indicate that the fire was of incendiary origin, the corpus delicti is sufficiently proved to justify the admission of evidence of extrajudicial confessions.[6] But there must be some evidence of some kind tending to show the incendiary character of the fire, aside from admissions and confessions.[7]

1. People v. Hiltel, 131 Cal. 577, 63 Pac. 919.

2. People v. Besold, 154 Cal. 363; People v. Jones, 123 Cal. 65. See CRIMINAL LAW.

3. People v. Jones, 123 Cal. 65.

4. People v. Saunders, 13 Cal. App. 743.

5. People v. Morley, 8 Cal. App. 372.

6. People v. Jones, 123 Cal. 65; People v. Morley, 8 Cal. App. 376, holding that circumstances pointing to defendant's connection with the crime should also be shown before proof of extrajudicial confessions is introduced.

7. See People v. Simonsen, 107 Cal. 345 (where the court states this proposition).

§ 12. Intent and Motive.—As in other criminal proceedings, evidence of declarations of the defendant, against his interest, may be introduced to connect him with the crime of arson, and to show intent and motive for the act.[8] Thus it is not error to admit testimony of two or three conversations, at different times, when former fires on the property were discussed, in which the defendant used expressions to the effect that they were nothing compared with what was to happen in the future, and other like expressions of a threatening character.[9] In a like manner intent and motive may be shown by testimony of a statement made prior to the burning, in which the defendant said that he would have to sell out, since he could not pay the rent, and that if he could not get a certain price for the property he would "have to sell out to the insurance company."[10]

The defendant cannot show that intent and motive were lacking, by evidence tending to prove that his intention to commit the offense was known to the officers before the fire. The fact that the officers knew of his plan and were near the building which the defendant set on fire, in order to arrest him, does not palliate the crime.[11] It has been held that instructions requested, to the effect that the jury should give the same weight to the defendant's testimony as to that of any other witness, that intent to commit the crime must be proved by positive evidence, and that the defendant could not be convicted if the dwelling burned caught fire from the burning of a wine cellar or tank-house, were erroneous, and were properly refused.[12]

§ 13. Circumstantial Evidence.—Arson, like other crimes, may and frequently must be proved by circumstantial evidence;[13] and the evidence connecting the de-

8. People v. Davis, 135 Cal. 162. And see cases cited infra.

9. People v. Lattimore, 86 Cal. 403.

10. People v. Levine, 85 Cal. 39.

11. People v. Greening, 102 Cal. 384. And see supra, § 4.

12. People v. Hiltel, 131 Cal. 577.

13. People v. Lejkojes (Cal.), 192 Pac. 160.

fendant with the crime may be almost wholly, or wholly circumstantial.[14] The law does not require, in order to justify the inference of legal guilt in cases of circumstantial evidence, that the existence of inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.[15] In this connection it has been held that circumstantial evidence may be deemed sufficient to sustain the verdict of guilty, even though such evidence may appear to the court of review to indicate a "close case."[16] Illustrating this character of testimony, evidence that the defendant had acquired a business which was not profitable, and in connection with which he told conflicting stories; that he had taken out two policies of insurance upon his furniture; that he had borrowed coal-oil a day or two before the fire, and that the fire had started from paper saturated with coal-oil, may be presented to the jury and may warrant conviction.[17]

IV. TRIAL, VERDICT AND PUNISHMENT.

§ 14. Burden of Proof, Reasonable Doubt.—To justify a conviction for arson the evidence must establish beyond a reasonable doubt the existence of every fact necessary to constitute the offense, and identify the defendant as the perpetrator,[18] and, of course, the venue of the crime

14. People v. Hiltel, 131 Cal. 577, 63 Pac. 919 (conviction may be upon either direct or circumstantial evidence, provided it is sufficient to satisfy the jury of the defendant's guilt beyond a reasonable doubt); People v. White, 19 Cal. App. 555; People v. Hoffman, 13 Cal. App. 298 (where a conviction of arson in the second degree was upheld on appeal, the evidence against the defendant being circumstantial). See People v. Phipps, 39 Cal. 326, where it was held that the circumstantial evidence was insufficient to support a conviction.

15. People v. Lejkojes (Cal.), 192 Pac. 160.

16. People v. Scott, 13 Cal. App. 301.

17. People v. White, 19 Cal. App. 555. See CRIMINAL LAW as to circumstantial evidence generally.

18. People v. Abrams, 174 Cal. 172.

must be proved as alleged.[19] The jury must be satisfied from the evidence, beyond a reasonable doubt, that he set fire to the building with the intent to destroy it.[20] And in a prosecution for arson in the first degree, the burden of proof is on the prosecution to show affirmatively that at the time of the commission of the offense, some human being other than the defendant was actually within the building.[1] And so it has been held that an instruction that the jury may convict although it may not be "entirely" satisfied from the evidence that the defendant, and no other or different person, committed the alleged offense, is erroneous, inasmuch as "beyond a reasonable doubt" means that the jury must be "entirely" satisfied as to defendant's guilt.[2] However, to be satisfied "beyond a reasonable doubt" does not mean that the jury cannot convict, although the evidence is entirely circumstantial, when such evidence is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion. In such a case the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses.[3]

§ 15. Proof of Corpus Delicti.—In arson cases, as in trials of criminal actions generally, ordinarily the corpus delicti should be the first point to which the evidence should be directed. But the order or proof is usually in the discretion of the court, and unless it clearly appears that the defendant has been prejudiced by the manner in which that discretion has been exercised, it will not justify a reversal of the judgment.[4] Thus a ruling permitting

19. People v. Fisher, 51 Cal. 319.

20. People v. Mooney, 132 Cal. 13. See CRIMINAL LAW.

1. People v. Abrams, 174 Cal. 172. And, generally, see cases cited infra.

2. People v. Phipps, 39 Cal. 326.

3. People v. Lejkojes (Cal.), 192 Pac. 160; People v. Daniels, 4 Cal. Unrep. 248. See supra, § 13, as to circumstantial evidence.

4. People v. Jones, 123 Cal. 65; People v. Saunders, 13 Cal. App. 743. See CRIMINAL LAW.

the admission in evidence of the confessions of a defendant, accused of arson, before proof of the corpus delicti, has been upheld. While the mere proof that a building was destroyed by fire does not establish the corpus delicti in a trial for arson,[5] it has been held that where the physical condition of the premises shows that several separate and distinct fires had been started, such evidence, taken in connection with other evidence tending to show the improbability of the fire being the result of an accident, may be sufficient to complete the proof of the corpus delicti.[6]

§ 16. View of Place.—The authority of the court to allow the jury to view the place where the offense is charged to have been committed is expressly given in the Penal Code.[7] Where a party requests that there be a viewing of the premises where the burning took place, he should not be heard afterward to object, unless he can show that, without his consent or knowledge, there has been some misconduct in the proceeding which has caused him substantial injury. Hence, in a case where the court, upon motion of the prosecuting attorney, and without objection on the part of the defendant, made an order directing the jury to inspect the premises where the crime was alleged to have occurred, the court charging the jury that during their absence they should not converse among themselves, nor permit anyone else to converse with them or in their presence or hearing, and that they were to remain mute and carefully observe the scenes and objects that might be pointed out to them, and that nothing they might see while away was to be regarded as evidence, it was held, where the objects and places were

5. People v. Simonsen, 107 Cal. 345 (not an arson case. The court deals with arson in speaking generally of requisites or corpus delicti).

6. People v. Saunders, 13 Cal. App. 743.

7. Pen. Code, § 119. See CRIMINAL LAW.

pointed out by the officer, he accompanying his statements by "This is said to be," etc., that if the evidence did not show that each particular place and object was "said to be" such as described, it was at most an irregularity which the defendant waived by not objecting to it when he first had the opportunity to do so.[8]

§ 17. Verdict and Punishment.—Where the indictment charges only the lowest degree of a crime, as defined by the code, it is unnecessary for the jury to specify in the verdict, the degree of the crime of which the defendant is found guilty.[9] However, if the indictment generally charges the crime of arson, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.[10]

Punishment.—The crime of arson is a felony.[11]

"Arson is punishable by imprisonment in the state prison, as follows: 1. Arson in the first degree, for not less than two years; 2. Arson in the second degree, for not less than one nor more than twenty-five years."[12]

Order dismissing information.—Arson being a felony, it has been held that the dismissal of an information for that offense, and the discharge of the defendant thereupon, pursuant to section 1385 of the Penal Code, after the reversal of a previous judgment of conviction and of an order denying a new trial, does not have the effect to acquit the defendant, and is not a bar to his trial and conviction upon a new information for the same offense.[13]

Review on appeal.—Where on a review of the whole case no error prejudicial to the substantial rights of the defendant appears to have been committed, the judgment

8. People v. Fitzgerald, 137 Cal. 546.

9. People v. Fisher, 51 Cal. 319.

10. Pen. Code, § 1157; People v. Coch, 53 Cal. 627.

11. People v. Mooney, 132 Cal. 13, 63 Pac. 1070.

12. Pen. Code, § 455.

13. People v. Mooney, 132 Cal. 13, 63 Pac. 1070.

appealed from will be upheld.[14] And in such a case the court on appeal cannot reverse the judgment, nor declare as a matter of law that the trial judge was guilty of any abuse of discretion in refusing to grant a new trial.[15]

14. People v. Levine, 85 Cal. 39; People v. Scott, 13 Cal. App. 301 (holding that in such a case the verdict cannot be disturbed on the ground of insufficiency of the evidence).

15. People v. Lejkojes (Cal.), 192 Pac. 160.

(S. W. S.)

ASSAULT AND BATTERY.

A. IN GENERAL.

1. Scope of Article.
2. Definitions.

B. CIVIL ACTIONS.

I. In General.

3. Right of Action, Generally.
4. Limitation of Action.
5. Evidence.
6. Pleading, Trial and Verdict.

II. Defenses.

7. In General.
8. Protection of Property.
9. Ejection of Trespasser.

III. Damages.

10. Compensatory Damages.
11. Exemplary Damages, Generally.
12. Amount of Exemplary Damages.
13. Evidence in Mitigation of Damages.

C. CRIMINAL ACTIONS.

I. In General.

14. Elements—Intent.
15. Attempt.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 193 Pac.

16. Ability—Excessive Force.
17. Persons Liable.
18. Particular Kinds and Degrees of Assaults.

II. Aggravated Assaults.

19. Assault With a Deadly Weapon, Generally.
20. Assault With Deadly Weapon by Life Prisoner.
21. What Constitutes a Deadly Weapon.
22. Assault With or by Aid of Chemicals.

III. Defenses.

23. Self-defense.
24. Right to Eject Trespassers.
25. Intoxication and Insanity.

IV. Evidence.

26. In General.
27. Intent, Motive and Ability.
28. Character Evidence.

V. Procedure.

29. Jurisdiction.
30. Indictment and Information.
31. Instructions.
32. Verdict of Conviction.
33. Sentence and Punishment.

A. IN GENERAL.

§ 1. Scope of Article.—The commission of the offense of assault and battery usually violates rights which admit of both civil and criminal remedies. Although the elements of assault and battery are practically the same, whether the action be a civil or a criminal one, the inherent differences between the two kinds of actions de-

mand separate treatment. In the consideration of civil actions for assaults, the rules as to damages here presented must be read in the light of the principles which govern as to damages recoverable in civil actions generally.[1]

While general rules and principles of criminal law must necessarily be touched upon, such rules and principles are not discussed except in their connection with the subject at hand.[2] Certain aggravated assaults will be treated in this article;[3] whereas, other assaults made with specific intent to commit more serious offenses are considered in separate articles.[4] Assaults which involve the liability of common carriers, masters, principals, etc., are likewise referred to under other topical headings.[5] Matters relating to necessary force which may be used by an officer in making an arrest, and the question of the liability of the party arrested for resisting such force, are treated only incidentally.[6] And although it is necessary to discuss the force which may be used in expelling trespassers, only those points which deal directly with assault will be considered.[7]

§ 2. Definitions.—The code definitions of assault and battery are substantially the old or common law definitions:[8]

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."[9]

"A battery is any willful and unlawful use of force or violence upon the person of another."[10]

1. See DAMAGES.

2. See CRIMINAL LAW.

3. See infra, §§ 19–22.

4. See CONSPIRACY; HOMICIDE; LEWDNESS; MAYHEM; POISONS; RAPE; ROBBERY; SEDUCTION; SODOMY.

5. See AGENCY; CARRIERS; MASTER AND SERVANT.

6. See ARREST.

7. See FORCIBLE ENTRY AND DETAINER; TRESPASS.

8. People v. Wells, 145 Cal. 138, 78 Pac. 470; People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800; People v. Yslas, 27 Cal. 630. As to elements of assault, see infra, §§ 14–16. As to whether an assault is a misdemeanor or felony, see infra, §§ 18, 32.

9. Pen. Code, § 240; People v. Stanton, 106 Cal. 139, 39 Pac. 525.

10. Pen. Code, § 242.

The term "violence" is not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person of another, although only the feelings of such person are injured by the act; and it is immaterial what kind of physical force is used.[11] Battery includes and implies an assault, for there can be no battery without an assault;[12] but the assault itself does not include battery, since the assault is merely an attempt to commit the battery.[13]

B. CIVIL ACTIONS.

I. IN GENERAL.

§ 3. Right of Action, Generally.—It has been stated as a general rule that a civil action to recover damages lies in every case where the defendant, on the same state of facts, would be liable for criminal assault or assault and battery.[14] While the right of a person to maintain an action for damages for personal injuries, such as assault and battery, expires with him, a new and distinct right of action is created under the code, by which an action for damages for an assault which caused the death of a per-

11. People v. Bradbury, 151 Cal. 675, 91 Pac. 497.

12. People v. McDaniels, 137 Cal. 192, 92 Am. St. Rep. 81, 59 L. R. A. 578, 69 Pac. 1006; People v. Helbing, 61 Cal. 620 (battery is a greater offense than assault, and, being the greater, it includes the less).

See People v. Defoor, 100 Cal. 150, where the court quotes Bishop on Criminal Law, to the effect that a man convicted of an assault cannot afterward be convicted of the battery in which it terminated. "The one is a necessary part of the other." If he be punished for the battery, he will thereby be twice punished for the assault. The only established exception to the foregoing proposition, the court says, is where death subsequently occurs as a result of the assault.

13. People v. Helbing, 61 Cal. 620.

14. 2 Ruling Case Law, 572. See note, 6 A. L. R. 1038, as to right to maintain action for assault and battery under Married Women's Acts. See infra, §§ 14–21, for elements of assault in criminal cases.

son may be maintained by the heirs or personal representatives of the deceased.[15]

Action by trespassers.—The general rule is that a trespasser, in possession of real property without right, cannot maintain an action for trespass on his person—assault and battery—against the owner, who, having right to possession, makes a forcible entry on the premises to dispossess such trespasser, where no more force than is necessary is used to make the entry effective. In such case the only available action is the statutory one of forcible entry. At common law the trespasser could only maintain an action for damages against the owner, provided an excessive use of force was employed in making the entry or dispossessing him, and then only for that excess. The rule of the common law is the rule which obtains in California, except in so far as it has been changed by statutory provisions relative to the summary remedy provided by them for a forcible entry made upon real property.[16]

§ 4. Limitation of Action.—The code prescribes the period of one year as the limitation of actions for assault.[17] Hence to recover in such action it must appear that the offense was committed within one year prior to the commencement of the action, unless matters in avoidance of the bar of the statute are pleaded.[18] But in an action for damages for an assault, the defendant is not estopped from pleading the statute of limitations, where he is not alleged to have concealed the facts constituting

15. Code Civ. Proc., § 377; Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243. See ABATEMENT AND REVIVAL, vol. 1, p. 71 et seq., for treatment of the general rule that right of action for personal injuries expires with the person. And see infra, § 4, as to the new statutory right in the representatives and limitations of right.

16. Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606. See FORCIBLE ENTRY AND DETAINER.

17. Code Civ. Proc., § 340.

18. See, generally, LIMITATION OF ACTIONS.

the cause of action, but had merely declared that those facts, well known to both parties, did not give rise to an action at law, and where the complaint shows on its face negligence on the part of plaintiff in taking no action of any kind to redress the known wrong during the period of the statute and for a long time thereafter, nor to make inquiry concerning the truth of the representations of law alleged to have been made by the defendant. This holding is based on the well-established rule that misrepresentation of law is not actionable fraud and will not work an estoppel.[19]

Time for bringing suit by personal representative.—Section 377 of the Code of Civil Procedure, giving the heirs or personal representatives of a deceased person a right of action for his death, wrongfully produced through the act of another, creates a purely statutory right, and one which did not exist at common law. A totally new action is given against the person who would have been responsible if the deceased had lived. It follows, of course, that the time for bringing an action for damages for the death of a person injured by an assault begins to run from the time of the death of the injured person, and not from the time that the injury causing his death was inflicted upon him. Nor does the fact that the deceased did not bring an action in his lifetime for the damages occasioned to him by the injuries inflicted upon him bar the right of the heirs or personal representatives of the deceased to exercise and prosecute their right of action.[20]

§ 5. Evidence.—The language used at the time of making an assault is a part of the res gestae, and evidence of such language is admissible for the purpose of characterizing the act, as bearing upon the question of malice;[1]

19. Robbins v. Law (Cal. App.), 192 Pac. 118. See generally, ESTOPPEL; FRAUD.

20. Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243. See DEATH.

1. MacDougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

but acts and declarations of the plaintiff, occurring after the injury was done, and not in the sight or hearing of the defendants, are not part of the res gestae, and should not be admitted into evidence, as such.[2] However, introduction of evidence of transactions and declarations, the consideration of which would distract the attention of the jury from the assault and introduce a multiplicity of issues, is not permissible.[3] Evidence of the good character of the defendant is not admissible, since his character is not an issue involved, as in some suits for libel, certain kinds of fraud, etc.[4]

Admissibility of plea and judgment in criminal case.— The judgment in a criminal suit cannot be used in a civil action, to establish the facts on which such judgment rests. Where, however, a defendant has pleaded guilty in a criminal case for assault, the plea and judgment are received in evidence as an admission, but not as conclusive. Such evidence should therefore be treated according to the principles governing admissions, to which class it properly belongs. Where this plea is introduced, the evidence of all that was said when the defendant made the plea may be introduced to qualify the admission. It seems, however, that if the defendant has been acquitted in the justice court on a plea of "not guilty," he will not be permitted to introduce the record or prove such fact in a civil suit. The reason for this rule is that the criminal proceeding was by the state, and the plaintiff in the civil action was no party to the criminal action.[5]

2. Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

3. Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118.

4. Vance v. Richardson, 110 Cal. 414, 42 Pac. 909.

5. Risdon v. Yates, 145 Cal. 210, 78 Pac. 641 (holding that the refusal to allow the qualifying evidence respecting the manner of making the admission is prejudicial where evidence is conflicting as to which party struck the first blow). On the other hand, see Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875, which seems to imply that evidence of acquittal is admissible where the plaintiff in the civil suit was the prosecuting witness in the criminal action, but only for the

§ 6. Pleading, Trial and Verdict.—The complaint, as in all other civil actions, should contain a statement of the facts constituting a cause of action in ordinary and concise language.[6] In the trial of civil actions for assault and battery, as in other civil actions, questions of fact are to be determined by the jury, or, if there is no jury, by the court. Where the court hears the case, it is within its province of taking judicial knowledge of certain well-known facts.[7]

Verdict for joint assault.—When two or more defendants are found guilty of an assault and damages are assessed, there can be but one verdict for a single sum against all the defendants, and each is liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of his degree of culpability.[8]

purpose of showing plaintiff's bias and feeling. The court held that where, as a matter of fact, the defendants had been acquitted on a criminal prosecution by the plaintiff, and after he had answered on cross-examination that he was the prosecuting witness in that case, the refusal to allow proof of the acquittal of the defendants, which was pertinent only to show his feeling and bias against the defendants, and as going to his credibility as a witness, was harmless error, where such feeling was fully admitted, and was manifest throughout the case, and where the circumstances were such that his hostile feeling would have been inferred by the jury.

6. Jones v. Lewis, 19 Cal. App. 575, 126 Pac. 853 (holding that a complaint which alleges that the defendant "violently and maliciously assaulted the plaintiff with a hammer and striking plaintiff upon the arm and upon the face with said hammer, bruising and wounding plaintiff, and more particularly crushing in and fracturing the plaintiff's cheek-bone under and to the left of the plaintiff's left eye," sufficiently sets forth the assault, the means employed, and the character thereof); Pennington v. Caughey, 145 Cal. 10, 78 Pac. 227 (holding that a complaint for assault and battery which alleges that the defendant assaulted the plaintiff and kicked him in the face and on the body, and that he "thereby seriously wounded and bruised the plaintiff, to his damage" in a specified sum, is to be construed as imputing that by reason of the acts complained of, the plaintiff sustained damage to that amount, and is sufficient in its allegations as to the damages). See DAMAGES; PLEADING.

7. Barker v. Hope, 1 Cal. Unrep. 877.

8. Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

II. DEFENSES.

§ 7. In General.—Provocative acts of the party assaulted, such as vile language used toward the aggressor and threats to assault him, may be set up as a defense.[9] However, where such acts are alleged to have taken place at the same time as the assault, other provocative acts of the party assaulted, committed before the time of the alleged offense, cannot be shown in evidence.[10] Intoxication is no defense whatever in a civil action. It is conceivable, however, that the amount of recovery might be considerably affected by showing that the wrong was committed under such conditions that no one would have been likely to attach importance to it.[11]

Self-defense and burden of proof.—Self-defense is an affirmative defense, and therefore one which must be established by a preponderance of the evidence. There is no presumption that a bodily injury is justifiable, and the justification must be proved by him who asserts it.[12] If in the course of proving an assault, as alleged in the complaint, the plaintiff incidentally brings out facts tending to support a plea of self-defense, the defendant is entitled to the benefit of such evidence. But the burden of proof to establish such self-defense remains with the defendant,[13] and he must show that he used no greater force than was necessary to repel the attack of the plaintiff.[14]

9. Patton v. Klemmer, 15 Cal. App. 459, 115 Pac. 62.

10. Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668.

11. St. Ores v. McGlashen, 74 Cal. 148, 15 Pac. 452.

See infra, § 25, as to intoxication as a defense in a criminal action for assault.

12. Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993; Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875; Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243 (holding that the fact that the assailant secured a weapon with which to protect himself is irrelevant, when it is not shown that such weapon was procured for the particular purpose of protecting himself from the party whom he assaulted).

13. Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

14. Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243. See infra, § 11, as to criminal prosecution be-

§ 8. Protection of Property.—In regard to the right to use force in the protection of property, the code stipulates that

"Any necessary force may be used to protect from wrongful injury, the person or property of oneself, or of a wife, husband, child, parent or other relative, or member of one's family, or of a ward, servant, master or guest."[15]

However, the right to use force to protect possession, particularly as against the person of another, is always limited by the condition that the force used must be no more than is reasonably adequate and necessary to the occasion.[16]

Recovering property.—When property is wrongfully held by another, the owner is justified in recovering it, only where such recovery may be made peaceably.[17] And the question as to whether he has used an excessive amount of force in recovering his property is peculiarly one for the jury.[18] If such force is judged to be excessive, he is liable in damages for assault.[19]

§ 9. Ejection of Trespasser.—The right of the owner of premises to expel trespassers is substantially the same under the code as at common law.[20] At common law the owner of real estate had the right to enter upon his prop-

ing no bar to recovery of exemplary damages in civil action for the assault.

15. Civ. Code, § 50.

16. McLean v. Colf, 179 Cal. 237, 176 Pac. 169; Dinan v. Fitz Gibbon, 63 Cal. 387; Riffel v. Letts, 31 Cal. App. 426, 160 Pac. 845 (as much force as is necessary may be used to retain one's property which a trespasser has taken into possession and is trying to carry away).

17. Silverstin v. Kohler & Chase, 181 Cal. 51, 183 Pac. 451.

18. McLean v. Colf, 179 Cal. 237, 176 Pac. 169; Dinan v. Fitz Gibbon, 63 Cal. 387.

19. Silverstin v. Kohler & Chase, 181 Cal. 51, 183 Pac. 451.

20. Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606; Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892; Townsend v. Briggs, 99 Cal. 481, 31 Pac. 116; McCarty v. Fremont, 23 Cal. 196; Braly v. Fresno City Ry. Co., 9 Cal. App. 417, 99 Pac. 400; Page v. Lynch, 2 Cal. Unrep. 121.

erty to expel by force an intruder, and in doing so was entitled to use all the force necessary to secure possession. Having the right of entry and exercising it, he was not subject to an action for tort for damages resulting either from his entry or from any force used upon, or physical injury sustained by one in wrongful possession, provided he used no more force than was necessary to dispossess him.[1] As to the amount of force which the owner may use in ejecting the trespasser, due allowance should always be made for the difficulty which a reasonable man would have in measuring the exact amount of force necessary,[2] and for the manner in which the trespasser is armed. Thus an owner may be justified in the use of a loaded gun when he knows that the trespasser is protecting himself with firearms.[3]

Necessity for warning.—When the trespasser upon one's premises is not engaged in a violent act such as would justify the owner in forcibly ejecting him instantly, the owner before using force should request the trespasser to depart.[4] The language of the request is immaterial, provided it is clear to the trespasser that the request has been made.[5] After making such request the owner, upon the refusal of the trespasser to leave, may use such amount of force as is necessary to accomplish the expulsion.[6]

Who is a trespasser.—A person who rightfully enters premises, immediately becomes a trespasser when he com-

1. Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606.

2. Townsend v. Briggs, 99 Cal. 481, 31 Pac. 116.

3. Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606.

4. Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892 (where an infirm old man with a passion for flowers, in passing a garden with the gate open, went in and commenced to pick some flowers, whereupon the owner of the garden, rushing into it, and without any request to leave, or any warning whatever, severely beat the man so trespassing and injured him seriously, it was held that the owner was guilty of an unlawful act in thus assaulting and beating the old man).

5. Townsend v. Briggs, 99 Cal. 481, 31 Pac. 116.

6. Page v. Lynch, 2 Cal. Unrep. 121.

mences to do damage, and the owner has the right to eject him, although he is doing no damage at the time he is put out.[7] So, a passenger on a street-car who refuses to pay his fare becomes a trespasser, and may be ejected by the conductor for such nonpayment. But the conductor has no right to assault or otherwise maltreat the passenger merely because he is primarily in the wrong by his refusal to pay the required fare. If the conductor uses unnecessary force in ejecting the passenger and assaults him, the latter has a right of action against the street-car company, since he is still a passenger so far as the nature of the treatment due him from the company and its agents is concerned.[8]

III. DAMAGES.

§ 10. Compensatory Damages.—Under the rule of the code prescribing the measure of damages for the breach of an obligation not arising from contract,[9] it is proper for the court or the jury, in an action for damages for assault, to take into consideration the earning capacity of the plaintiff, the length of time during which he was incapacitated from work by reason of the assault, his impaired efficiency in performing his labors after the assault, the doctor's fees incurred by necessary attention during the period he was disabled, etc. The earning capacity of the plaintiff prior to the assault, and not after, should be taken into consideration, and evidence of such earning capacity may be given by the plaintiff.[10] In a case where the plaintiff cannot pursue his former occupation on account of the assault, it is proper for the jury to take

7. Townsend v. Briggs, 99 Cal. 481, 31 Pac. 116.

8. Braly v. Fresno City Ry. Co., 9 Cal. App. 417, 99 Pac. 400. See CARRIERS.

9. Civ. Code, § 3333. See, generally, DAMAGES. And see note, 6 A. L. R. 388, as to civil liability growing out of mutual combat; and note, 6 A. L. R. 985, as to civil action for assault upon female person.

10. Ehat v. Scheidt, 17 Cal. App. 430, 120 Pac. 49.

into consideration his probable expectation of life, and in this consideration it may be aided by mortuary tables introduced in evidence. The defendant, however, may rebut such testimony by proving any fact tending to show that plaintiff's expectation of life is below the average, such as the fact that plaintiff had the habit of drinking liquor to excess, or was a drunkard.[11]

Damages not allowed.—The jury in awarding compensatory damages should not include in its consideration injuries which are not the proximate result of the battery,[12] and damages, evidently given under the influence of passion and prejudice, cannot be allowed.[13] Even though it does not appear that there is passion or prejudice on the part of the jury in assessing damages, a new trial should be granted where, in the opinion of the court, the damages are excessive,[14] or where they are grossly inadequate.[15]

Damages in action brought by representatives of person assaulted.—In an action brought by the heirs of a person assaulted, the award should not include damages resulting from the personal injury to the deceased, but, being a new right of action, should include damages for the pecuniary loss resulting from the death, to the surviving members of his family.[16]

11. Townsend v. Briggs, 99 Cal. 481, 31 Pac. 116 (reconsidering Townsend v. Briggs, 3 Cal. Unrep. 803, 32 Pac. 307).

12. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496. See, generally, DAMAGES.

13. McCarty v. Fremont, 23 Cal. 196.

14. Meinberg v. Jordan, 29 Cal. App. 760, 157 Pac. 1005, 1007.

15. Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108; White v. Prader, 1 Cal. Unrep. 54 (where it is shown in an action for damages that the plaintiff was the aggressor in an affray which led to the assault complained of; that the defendant was intoxicated and acting in self-defense, although he struck more blows than were necessary to repel the attack; that plaintiff was not permanently disabled by the injuries received at the hands of the defendant, and that he was not injured socially by the affair, an award of five thousand dollars damages by the jury will be set aside as excessive, unconscionable and unjust). See DAMAGES.

16. Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243. See DEATH.

§ 11. Exemplary Damages, Generally.—Under the code rule entitling one to exemplary damages in certain cases,[17] such damages may be given for a wanton and malicious assault upon the person.[18] It is a rule, therefore, that the jury may allow punitive damages if they believe from the evidence that a malicious intent existed. However, in cases such as assault and battery, "the law in tenderness to human frailties, distinguishes between an act done deliberately and an act proceeding from sudden heat." And so, while the jury might allow punitive damages if they believed from the evidence that a malicious intent existed, if, however, the battery was the consequence of a sudden heat resulting from provocation first offered by the plaintiff, and not of a design for his injury deliberately formed by the defendant, and that the force used was not so disproportionate to the provocation as to repel the inference that it was induced thereby, then no exemplary damages should be included in their verdict.[19]

Malice, oppression, fraud.—Malice on the part of the defendant is one of the grounds for the allowance of exemplary damages;[20] but such malice must be shown to be malice in fact, as distinguished from malice in law.[1] In order to prove malice, a preponderance of evidence that such malice existed is all that is necessary to justify the jury in awarding punitive damages,[2] such as evidence of

17. Civ. Code, § 3294. See, generally, DAMAGES.

18. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496; Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606; Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; St. Ores v. McGlashen, 74 Cal. 148, 15 Pac. 452; Wade v. Thayer, 40 Cal. 578; MacDougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98; Wilson v. Middleton, 2 Cal. 54; Ehat v. Scheidt, 17 Cal. App. 430, 120 Pac. 49.

19. Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118.

20. MacDougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98. See DAMAGES.

1. Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606.

2. St. Ores v. McGlashen, 74 Cal. 148, 15 Pac. 452.

the language used at the time of the assault,[3] and evidence of any other facts tending to show the motive and intent of the assaulting party.[4] The jury, however, should not award exemplary damages regardless of any malicious intent in the mind of the defendant.[5] It will be seen that malice is but one of several causes for which exemplary damages may be given, for by the provisions of section 3294 of the Civil Code, punitive damages may also be recovered where the defendant has been guilty of oppression or fraud in making his assault.[6]

Wanton and malicious acts of agent or servant.—A principal is liable in an action for damages, for an assault, for all the actual damage caused by his agents or servants in the performance of their official duties; but he is not liable for their wanton and malicious acts done without his consent or approval.[7]

Effect of criminal prosecution.—The fact that the defendant has been punished criminally,[8] or that he is still subject to a criminal prosecution for the assault, constitutes no bar to the recovery of exemplary damages.[9]

§ 12. Amount of Exemplary Damages.—The amount of exemplary damages is largely in the discretion of the jury, but such damages should never include any sum to indemnify the plaintiff for counsel fees, or expenses incurred in the prosecution of the suit, over and above taxed

3. MacDougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

4. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496 (a deliberate seeking of a quarrel by the defendant, followed by threats of personal violence, soon succeeded by the striking of a blow, are sufficient facts to show malice); Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606.

5. Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118. See DAMAGES.

6. St. Ores v. McGlashen, 74 Cal. 148, 15 Pac. 452.

7. Wade v. Thayer, 40 Cal. 578; Riffel v. Letts, 31 Cal. App. 426, 160 Pac. 845. See AGENCY, vol. 1, p. 843.

8. Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668.

9. Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Wilson v. Middleton, 2 Cal. 54.

costs.[10] Inasmuch as exemplary damages are assessed more as a punishment of the offender than as a reward to the party assaulted, it has been held proper for the jury, in determining the amount, to take into consideration the defendant's wealth at the time of the trial, to determine what degree of punishment would be inflicted on him, by compelling him to pay a given sum of money.[11] So, also, the condition of the plaintiff subsequent to the injury may be taken into consideration in determining the amount of exemplary damages, provided the case is a proper one for the granting of such damages.[12] The justification for the assault and malice on the part of the defendant should also be taken into consideration in determining the amount.[13] In cases where the verdict includes both exemplary and compensatory damages the defendant cannot complain if he has not requested a form of verdict suitable for the segregation of the damages.[14]

§ 13. Evidence in Mitigation of Damages.—The general rule seems to be that evidence of circumstances, offered

10. Howell v. Scoggins, 48 Cal. 355. See DAMAGES.

11. Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875. See, generally, DAMAGES.

12. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496 (where the plaintiff suffered great pain, loss of memory, insomnia and other physical discomforts, subsequent to assault by defendant, whereas he had always been in perfect health prior to the assault, an award of exemplary damages of five thousand dollars is not excessive); Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 998 (where the evidence showed that plaintiff's skull was fractured and other very severe injuries had been inflicted upon him, and that he was still suffering from dizzy spells at the time of the trial, which would be likely to affect him for a long time, damages of nineteen hundred dollars, including both compensatory and punitive damages, were held to be reasonable); Seelye v. Harvey (Cal. App.), 189 Pac. 311 (an unjustified, malicious and unexpected attack upon the plaintiff before he could withdraw from the presence of the defendant, by reason of which blow plaintiff suffered a nervous shock and was confined to bed, held in this case, to warrant a verdict of exemplary damages of five hundred dollars).

13. Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118.

14. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496 (citing au-

in mitigation of damages, can be taken into consideration only in the reduction of exemplary damages, and not in the reduction of actual damages, accruing to the plaintiff from the assault.[15] Hence, where the plaintiff waives all claim to punitive damages, and the assault is admitted in the answer of the defendant, the defendant cannot introduce any testimony looking to mitigation of damages, and recovery can be had only for compensatory damages.[16] As to what mitigating circumstances may be taken into consideration by the jury, evidence that articles written by plaintiff were defamatory and gave defendant just cause for indignation,[17] also evidence that the battery was the consequence of sudden heat resulting from provocation first offered by the plaintiff, and not from a design deliberately formed by defendant,[18] may be considered in mitigation of exemplary damages. If the plaintiff was the aggressor, and had actually employed others to destroy what was confessedly the property of the defendant, and was aiding and abetting them in such attempt to destroy it, in the performance of which he received his injuries, these circumstances are proper for the consideration of the jury in mitigation of damages.[19] However, evidence received for another purpose cannot be considered in mitigation.[20]

thorities to the rule generally). See TRIAL.

15. Benjamin v. Walton, 181 Cal. 115, 183 Pac. 529; Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875; Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118. But see Dinan v. Fitz Gibbon, 63 Cal. 387, where the court says: "If the plaintiff was the aggressor, and had actually employed others to destroy what was confessedly the property of the defendant and was aiding and abetting them in such attempt to destroy it, in the performance of which he received his injuries, these considerations were proper for the consideration of the jury in mitigation of damages, without specifying whether compensatory damage is included in the expression, "mitigation of damages." See DAMAGES.

16. Benjamin v. Walton, 181 Cal. 115, 183 Pac. 529.

17. Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

18. Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118.

19. Dinan v. Fitz Gibbon, 63 Cal. 387.

20. MacDougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98 (holding

C. CRIMINAL ACTIONS.

I. IN GENERAL.

§ 14. Elements—Intent.—To constitute an assault, two elements are necessary. There must be an unlawful attempt,[1] and there must be a present ability to inflict the injury.[2] It has been said that intention to commit the act is necessary to constitute the offense in all cases;[3] and the intention must be to commit a present and not a future injury upon a different occasion. The acts done must be in preparation for an immediate injury.[4] However, it has been held that to constitute the offense of an assault with a deadly weapon, it need not appear that the intent was that the injury should follow immediately on the act which is the attempt. And so, it has been held that one who placed a vessel containing gunpowder in the coal-bin of the prosecuting witness may be guilty of such an assault although he was not present when the explosion occurred.[5]

that evidence of libel which was alleged to be the immediate provocation of the assault, and which was ruled out of the evidence in mitigation of damages, but which was received for another purpose, cannot be taken into consideration by the jury in mitigation).

1. See infra, § 15.

2. See infra, § 16.

3. People v. McMakin, 8 Cal. 547 (assault with deadly weapon).

"In order to constitute an assault there must be something more than a mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence accompanied by acts which if not interrupted will be followed by personal injury, the violence is commenced and the assault is complete. Thus, riding after the prosecutor so as to compel him to run into a garden for shelter, to avoid being beaten, was held to be an assault. So where the defendant was advancing in a threatening attitude, with intent to strike the plaintiff, so that his blow would in a second or two have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, it was held that an assault had been committed." People v. Yslas, 27 Cal. 630 (citing authorities to the illustrations).

4. People v. McMakin, 8 Cal. 547.

5. People v. Pape, 66 Cal. 366, 5 Pac. 621.

In cases of aggravated assaults.—In the more aggravated assaults, there must be an intent to strike with, or to use a deadly weapon,[6] or an intent to commit a felony.[7] And in case the assault is made with a deadly weapon, the intent, necessary for the commission of the offense, may be implied.[8] Hence the drawing of a deadly weapon, accompanied by a threat to use it, is sufficient to justify a finding of intent to commit a bodily injury, even though the party drawing the weapon does not directly point it at the other.[9] So, also, the pointing of a pistol directly at a person, within striking distance from him, is such an act as raises a presumption that the unlawful act was done with an unlawful intent.[10]

Intent to assault a particular person.—Under the statutory offense of assault with a deadly weapon, the intent must be to injure a person; therefore one who shoots at a dog and hits the owner, who is standing near by and within range of the shot, but without intent to hit such owner, cannot be convicted of assault.[11] But where one intends to assault or kill a certain person, and by mis-

6. People v. Dodel, 77 Cal. 293, 19 Pac. 484 (assault with deadly weapon). See infra, § 19 et seq., as to assault with deadly weapon; People v. McMakin, 8 Cal. 547 (assault with a deadly weapon with intent to inflict a bodily injury).

7. See infra, § 20, as to assaults by life prisoner, with malice aforethought and by use of deadly weapon; infra, § 22, as to assaults with caustic chemicals, or assaults consisting in the use of certain anesthetics with intent to commit or assist in the commission of a felony. And see infra, § 18, for references to other assaults of an aggravated nature.

8. People v. Leyba, 74 Cal. 407, 16 Pac. 200.

9. People v. McMakin, 8 Cal. 547. The court states that "if the prisoner did not intend to use the pistol at all, except for the sole purpose of intimidation, then it is apprehended the offense would not have been complete. But when the intent is to go further, if necessary to accomplish the purpose intended, and preparations are actually made, and weapons drawn and placed in a position to be instantly used offensively, and with effect, against another, and not in self-defense, it would seem to be clear that the offense would be complete."

10. People v. Wells, 145 Cal. 138, 78 Pac. 470.

11. People v. Keefer, 18 Cal. 636.

take or inadvertence assaults or kills another person instead, it is nevertheless a crime, and the intent is transferred from the party who was intended to the other.[12] The above rule that a party may be convicted of an assault, though no specific intent may have existed to commit the offense upon the person injured, has no application to a statutory offense like that of an assault with a deadly weapon with intent to inflict bodily injury on the person of another.[13]

§ 15. Attempt.—An attempt to commit a battery is an essential element of assault.[14] Such attempt must be apparent, but this does not mean that it must be apparent to the person against whom the assault is made, and it is no defense that the attack was made upon an unconscious person. Thus, powder, to which is attached a burning fuse, may be left near the person to be assaulted and the attempt is complete, although the party intended to be injured is ignorant of such attempt.[15] The fact that a person was thwarted in his attempt, before it resulted in actual violence, does not render his conduct any the less criminal. Hence, if a man points a loaded gun at a person and intends to shoot, the fact that the gun is snatched by a third person does not render the attempt less complete.[16] It has been said: "It is not the purpose of the court to draw nice distinctions between an attempt to commit an offense and an assault

12. People v. Wells, 145 Cal. 138, 78 Pac. 470; People v. Torres, 38 Cal. 141; People v. Keefer, 18 Cal. 636.

13. People v. Keefer, 18 Cal. 636. See infra, § 19, for elements of assault with a deadly weapon.

14. People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800; People v. Dodel, 77 Cal. 293, 19 Pac. 484; People v. Devine, 59 Cal. 630 (an instruction which omits attempt as an element of the offense is erroneous); People v. Yslas, 27 Cal. 630; People v. Piercy, 16 Cal. App. 13, 116 Pac. 322.

15. People v. Pape, 66 Cal. 366, 5 Pac. 621.

16. People v. Piercy, 16 Cal. App. 13, 116 Pac. 322. See infra, § 16, for same rule applied to ability.

with intent to commit the offense, for such distinctions could only have the effect to favor the escape of criminals from their just deservings." And so in view of the fact that all assaults to commit felonies can be prosecuted as attempts, it has been held that where a person has the present ability to accomplish the intended crime, when he has a loaded pistol, and the person intended to be fired at is within reach of its effect, the fact that the offender was mistaken as to the exact spot where his victim was located at the time of firing is immaterial.[17] The question as to whether the evidence is sufficient to show such attempt is, of course, properly left to the jury.[18]

§ 16. **Ability—Excessive Force.**—In addition to the intent and attempt to inflict injury on another, there must be the present ability to commit the offense.[19] Therefore, pointing an unloaded gun at another, accompanied by a threat to discharge it, and without any attempt to use it except by shooting, does not constitute an assault. There is in such a case no present ability to commit a violent injury on the person threatened, in the manner in which the injury is attempted to be committed. An assault cannot be committed by a person pointing in a threatening manner an unloaded gun at another, and this, too, regardless of the fact whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear.[20]

17. People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800.

18. People v. Hawkins, 127 Cal. 372, 59 Pac. 697.

19. People v. Wells, 145 Cal. 138, 78 Pac. 470; People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800; People v. Leong Yune Gun, 77 Cal. 636, 20 Pac. 27; People v. Dodel, 77 Cal. 293, 19 Pac. 484; People v. Bird, 60 Cal. 7; People v. Bennett, 37 Cal. App. 324, 173 Pac. 1004; People v. Grandi, 33 Cal. App. 637, 165 Pac. 1027; People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792.

20. People v. Wells, 145 Cal. 138, 78 Pac. 470; People v. Sylva, 143

Striking distance.—Where the weapon, if used, would be effective, the distance of the assailant from his intended victim is immaterial.[1] It is not even necessary that the person intended to be assaulted should be in view of the assaulting party, provided the latter believes the former is at the spot aimed at, and in reality the intended victim is within the effective range of the weapon used.[2]

Prevention of the battery intended.—The rule is established that the ability to commit the offense is not necessarily lacking when the act intended is in some manner prevented.[3] Hence, if a person having the present ability to commit a violent injury upon the person of another, and having with him a deadly weapon, rushes toward such other person with menacing gestures, and with a purpose to use such weapon, an assault is committed, though the offender is prevented from striking or using the weapon before he comes near enough to do so.[4]

Excessive force.—It is a general rule that excessive or improper force employed toward another will constitute an assault and battery, even though the act would have been lawful if excessive or improper force had not been used.[5]

Cal. 62, 76 Pac. 814; People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800 (stating the rule); People v. Bennett, 37 Cal. App. 324, 173 Pac. 1004; People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792. See 2 R. C. L., p. 535, for general discussion of Ability in Criminal Assault. It is there stated that there is much confusion in the authorities as to whether a criminal assault can be committed where the aggressor does not have the present ability to inflict injury on the person assailed.

1. People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800; People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792.

2. People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 17 L. R. A. 626, 30 Pac. 800.

3. People v. Bird, 60 Cal. 7; People v. Yslas, 27 Cal. 630; People v. Piercy, 16 Cal. App. 13, 116 Pac. 322.

4. People v. Bird, 60 Cal. 7.

5. McLean v. Colf, 179 Cal. 237, 176 Pac. 169; Riffel v. Letts, 31 Cal. App. 426, 160 Pac. 845.

§ 17. Persons Liable.—All persons concerned in the commission of an assault are principals in the assault and are liable as such.[6] And so it has been held in a prosecution for assault with a deadly weapon that an aider and abettor in the commission of such an assault, although he actually makes no assault with a deadly weapon himself, is in law a principal in the commission of the crime.[7] Under the statute making any person aiding or assisting, or advising or encouraging the perpetration of a crime, a principal,[8] it has been held not erroneous to charge the defendant as principal and accessory in the same indictment.[9]

§ 18. Particular Kinds and Degrees of Assaults.—Simple assault and battery are misdemeanors.[10] An assault

6. Pen. Code, § 31 (stating the rule generally); People v. Rozelle, 78 Cal. 84, 20 Pac. 30. The information in this case charged that the defendant did "encourage and advise," and also, that he did "aid, assist and procure" one G. R. to commit the offense of throwing vitriol upon the person of another, one C. R. P., etc., but whether being present, he aided and abetted, or not being present, he advised and encouraged, was not alleged. It was held that to allege such facts as would have been sufficient to constitute a defendant an accessory at common law is to charge him as a principal under the statute, and that therefore the information was not demurrable on the ground. See the case for the charging part of such an indictment); People v. Chin Ah Hong, 61 Cal. 376 (holding that in an assault committed, if the defendant took part in the assault it is immaterial whether he pulled the prosecuting witness back or struck him); People v. Davidson, 5 Cal. 133 (under act concerning crimes and punishments). See, generally, CRIMINAL LAW.

7. People v. Carson, 155 Cal. 164, 99 Pac. 970; People v. Davidson, 5 Cal. 133 (verdict of assault with deadly weapon with intent to commit great bodily injury); People v. Stevens, 15 Cal. App. 294, 114 Pac. 800. See infra, § 19, as to assault with deadly weapon.

8. See cases cited supra.

9. People v. Rozelle, 78 Cal. 84, 20 Pac. 36; People v. Davidson, 5 Cal. 133.

10. See infra, §§ 32, 33.

And it is a misdemeanor under the code for a person to have upon him any deadly weapon with intent to assault another. Pen. Code, § 467. See BURGLARY.

Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not ex-

with a deadly weapon or by any means or force likely to produce great bodily injury may, according to the sentence imposed, be either a misdemeanor or a felony, the rule being that where, following conviction, the defendant is sentenced to imprisonment in the state prison, the offense is deemed to be a felony;[11] but where the defendant is sentenced to imprisonment in the county jail, or a fine is imposed, the offense is a misdemeanor.[12] Certain other assaults of an aggravated nature are always felonies. Included in this last-named class are assaults with intent to commit murder;[13] assaults with intent to commit rape, the infamous crime against nature, mayhem, robbery or grand larceny;[14] and assaults to commit felonies generally.[15] One form of assault prescribed by the code is classed as a felony by reason of the fact that it is punishable by death.[16]

II. AGGRAVATED ASSAULTS.

§ 19. Assault With a Deadly Weapon, Generally.—The elements of aggravated assaults have been outlined in the code. One of the most important of these statutory assaults is "an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury."[17] An assault with a deadly weapon is an offense which necessarily includes within it the offense of assault.[18]

ceeding five thousand dollars, and imprisonment in the county jail not exceeding five years. Pen. Code, § 149.

11. See infra, § 19, as to assault with deadly weapon; and infra, § 22, as to assault with caustic or other chemicals.

12. See infra, § 33.

13. Pen. Code, §§ 217, 221. See HOMICIDE.

14. Pen. Code, § 220. See LARCENY; MAYHEM; RAPE; ROBBERY.

15. Pen. Code, § 221. As to felonies generally, see CRIMINAL LAW, and references to specific headings there given.

16. See infra, § 20, as to assault with deadly weapon by life prisoner. See infra, § 33, as to sentence and punishment.

17. Pen. Code, § 245.

18. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449. See infra, § 21, as to what constitutes a deadly

Malice does not constitute a necessary part of the crime of assault with a deadly weapon, as defined by the code;[19] and intent may be implied from the use of the deadly weapon itself.[20] As in all other cases of statutory construction, the defendant must be guilty of the very crime charged, and so, the elements of the crime, as defined by the legislature, must appear. The words of the statute are not merely formal; they are substantial—they constitute the very gravamen of the offense. The fact that the defendant is guilty of some crime is immaterial. He must be guilty of the very crime charged in order to justify a conviction.[1]

It is not necessary, in order to complete the offense, to show that the defendant actually injured his intended victim;[2] "it is complete by the assault, the weapon and the intent."[3] But there must have been an attempt to strike with or to use the deadly weapon or instrument or the means likely to produce great bodily injury.[4]

Throwing a person out of a third story window has been held to warrant a conviction under section 245 of the Penal Code, "since there is no reason why the perpetrator of such an act should not be as guilty as though he had used a pistol or knife." This ruling is impliedly under that clause of the section which includes assaults "by any means or force likely to produce great bodily injury."[5]

weapon; and infra, § 32, as to verdict and punishment.

19. People v. Lynch, 101 Cal. 229, 35 Pac. 860.

20. People v. Leyba, 74 Cal. 407, 16 Pac. 200. As to necessity of alleging intent in the information, see infra, § 30.

1. People v. Keefer, 18 Cal. 636.

2. People v. Rader, 24 Cal. App. 477, 141 Pac. 958.

3. People v. Keefer, 18 Cal. 636 (stating the rule); see supra, § 14, intent must be to injure person.

4. People v. Dodel, 77 Cal. 293, 19 Pac. 484.

5. People v. Emmons, 61 Cal. 487.

§ 20. Assault With Deadly Weapon by Life Prisoner.—The most aggravated form of assault is that prescribed in the following code provision:

"Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."[6]

Constitutionality.—This provision of the law has been declared to be constitutional by the United States supreme court and by the supreme court of this state.[7] It does not deny the equal protection of the law guaranteed by the fourteenth amendment to the constitution of the United States; nor does it contravene the provisions of section 11 of article I of the state constitution, declaring that all laws of a general nature shall have a uniform operation;[8] nor is the punishment of death for such

6. Pen. Code, § 246.

7. Finley v. California, 222 U. S. 28, 56 L. Ed. 75, 32 Sup. Ct. Rep. 13, see, also, Rose's U. S. Notes; People v. Swearningen, 168 Cal. 53, 141 Pac. 822; People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74; People v. Quijada, 154 Cal. 243, 97 Pac. 689; People v. Carson, 155 Cal. 164, 99 Pac. 970; People v. Finley, 153 Cal. 59, 94 Pac. 248.

8. Finley v. California, 222 U. S. 28, 56 L. Ed. 75, 32 Sup. Ct. Rep. 13, see, also, Rose's U. S. Notes; People v. Finley, 153 Cal. 59, 94 Pac. 248.

Upon the contention that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life, it has been said: "But there are valid reasons which justify the distinction. The 'life-termers,' . . . while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good conduct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts than do the crimes of those undergoing sentence for years. And, finally, if the legislature sought to make the

an offense either "cruel or unusual," within the meaning of those terms as used in the constitution.[9]

Elements.—In an action for assault with a deadly weapon by a prisoner serving a life sentence, it is necessary to show: 1. That the defendant at the time of the commission of the alleged assault was a prisoner undergoing a life sentence in the state prison; 2. That while undergoing such sentence he, with malice aforethought, made an assault upon the person of another; and 3. That the defendant made such assault with a deadly weapon.[10] Prior conviction is an essential element of the offense charged, and for this reason evidence of such conviction, where there is a plea of not guilty, does not come under the rule that evidence of previous convictions is not admissible where such convictions are admitted by the defendant, since the above plea puts in issue all material allegations. To show such conviction the record of the commitment is admissible.[11]

§ 21. **What Constitutes a Deadly Weapon.**—In assault with a deadly weapon, the character of the particular agency employed is the substance of the offense.[12] The weapon by name does not, in an assault of this character, become a necessary ingredient of the crime, but the nature of the weapon as being deadly or otherwise is alone important.[13] A deadly weapon is one

law applicable to convicts other than 'life-termers,' the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the 'life-termer' and the convict under sentence for years." People v. Finley, 153 Cal. 59, 94 Pac. 248, per Henshaw, J., quoted in substance in Finley v. California, 222 U. S. 28, 56 L. Ed. 75, 32 Sup. Ct. Rep. 13, see, also, Rose's U. S. Notes.

9. People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74. See CONSTITUTIONAL LAW.

10. People v. Carson, 155 Cal. 164, 99 Pac. 970.

11. People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74.

12. People v. Murat, 45 Cal. 281.

13. People v. Pape, 66 Cal. 366, 5 Pac. 621 (holding that one who attempts to commit a violent in-

likely to produce death or great bodily injury. The character of the weapon is ordinarily pronounced by the law. There may, however, be cases in which its character, that is to say, whether deadly or otherwise, depends upon the manner in which it was used,[14] or the part of the body upon which it was used, and therefore it becomes a mixed question of law and fact which the jury must determine under proper instructions.[15]

Weapons which are deadly.—Weapons which have been held to be deadly include: An ax;[16] a brick-bat weighing about five pounds;[17] gunpowder, when placed with a felonious intent;[18] a knife;[19] a pistol;[20] and a loaded

jury upon the person of another by means of the explosion of gunpowder is guilty of assault with a deadly weapon); People v. Congleton, 44 Cal. 92 (where the averment was in general terms "a deadly weapon").

14. People v. Valliere, 123 Cal. 576, 56 Pac. 433; People v. Leyba, 74 Cal. 407, 16 Pac. 200; People v. Fuqua, 58 Cal. 245.

15. People v. Valliere, 123 Cal. 576, 56 Pac. 433; People v. Rodrigo, 69 Cal. 601, 11 Pac. 481 (holding that an instruction that a deadly weapon "is any weapon or instrument by which death may be produced, or would likely to be produced, when being used in the manner in which it may appear it was used in the affray," and that "the jury are the judges as to whether the weapon was or was not a deadly weapon," is correct); People v. McFadden, 65 Cal. 445, 4 Pac. 421; People v. Fuqua, 58 Cal. 245; People v. Stevens, 15 Cal. App. 294, 114 Pac. 800 (holding that the jury may infer that the defendant used a deadly weapon from testimony to the effect that one of the wounds seemed to be clear cut to the bone, and another through to the skull, and were of such a character as might have been caused by the use of a sharp instrument, and were so located that death might have ensued).

16. People v. Guidice, 73 Cal. 226, 15 Pac. 44 (stating that where an ax is used with force intended to be sufficient to disable an antagonist and actually knocking him down, it is necessarily a deadly weapon).

17. People v. Fahey, 64 Cal. 342, 30 Pac. 1030.

18. People v. Pape, 66 Cal. 366, 5 Pac. 621.

19. People v. Nihell, 144 Cal. 200, 77 Pac. 916; People v. Leyba, 74 Cal. 407, 16 Pac. 200; People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Lightner, 49 Cal. 226.

20. People v. Jacobs, 29 Cal. 579 (a pistol may be of such dimensions as to be a deadly weapon, and it may be so small as to be a very insignificant instrument of assault). See note, 8 A. L. R. 1319, as to firearm used as a bludgeon as a deadly weapon.

stocking filled with salt and plaster hardened by wetting.[1]

Weapons not deadly.—Under no circumstances could a blow with a fist be considered a blow delivered with a deadly weapon.[2] Nor could the pointing of an unloaded gun be considered an assault with a deadly weapon.[3] A "heavy wooden stick" is not necessarily a deadly weapon, since "heavy" is too indefinite as to the weight, strength or size of the stick, or other qualities, properties or characteristics showing that it is a means likely to produce great bodily injury.[4]

On appeal.—Where the lower court gives a correct instruction as to what constitutes a deadly weapon, and there is some evidence to show that the weapon was deadly, a court of appeal will not review the question of the insufficiency of the evidence to show that the weapon was deadly.[5]

§ 22. Assault With or by Aid of Chemicals.—The code definition of assault with caustic chemicals reads:

"Every person who willfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison not less than one nor more than fourteen years."[6]

And it is also provided by the code that

"Every person guilty of administering to another any chloroform, ether, laudanum, or other narcotic, anesthetic, or intoxicating agent, with intent thereby to enable or

1. People v. Valliere, 123 Cal. 576, 56 Pac. 433.
2. People v. Munn, 65 Cal. 211, 3 Pac. 650.
3. People v. Sylva, 143 Cal. 62, 76 Pac. 814.
4. People v. Perales, 141 Cal. 581, 75 Pac. 170.
5. People v. Durand, 1 Cal. App. 71, 81 Pac. 672.
6. Pen. Code, § 244.

assist himself or any other person to commit a felony, is guilty of felony."[7]

An indictment for the willful and malicious throwing of vitriol, with intent to disfigure the body of another, includes an assault as a necessary element of the offense. It has been held, where every element of the offense charged is shown by the evidence, without contradiction, except the single element of intent, but where, upon the issue of intent, it appears that the defendant willfully and maliciously threw the vitriol upon the person of the prosecuting witness, that the court may properly refuse to instruct the jury that the defendant may be convicted of a simple assault, or of a mere attempt to commit the offense charged in the information.[8]

Upon the trial of one charged with the crime of assault with a caustic chemical as defined in section 244 of the Penal Code, it has been held that the contention that a sufficient foundation had not been laid for introducing in evidence certain articles consisting of a note found in the house occupied by the defendant, and an acid bottle, etc., is without merit where the identity of the articles was clearly established, and where it is apparent upon the record that the defendant could not possibly have been prejudiced by reason of the introduction of such evidence marked as exhibits in the case.[9]

III. DEFENSES.

§ 23. Self-defense.—It must be clearly understood that acts in self-defense alone are not assaults, since they are not unlawful. One person cannot assault another in self-defense; and any act done in self-defense cannot be an assault.[10] It is an elementary principle in criminal law

7. Pen. Code, § 222. As to poisoning food or water (Pen. Code, § 347) see POISONS.

8. People v. Stanton, 106 Cal. 139, 39 Pac. 525.

9. People v. Lytle, 34 Cal. App. 360, 167 Pac. 552.

10. People v. Lynch, 101 Cal. 229, 35 Pac. 860. See Civ. Code, § 50, as to right of self-protection.

that the person assaulted is justified in using so much force as is necessary to his defense. To repel a slight assault the person assaulted is not authorized to resort to measures of great violence. While the law will not measure the degree of necessary force with a nice hand and hold the person assaulted to accountability for force slightly disproportioned to the assault, yet it will hold him responsible for a clearly marked excess.[11]

Pursuant to this general principle, a person may use necessary force to protect himself where he is assailed in his own house, or upon his own premises,[12] or where he has reasonable ground to believe that a felony is about to be committed on his person,[13] or is under a reasonable apprehension of great bodily harm,[14] or where he is about to be subjected to an unlawful arrest.[15] In such cases the means employed to defend one's self must be necessary to prevent the injury;[16] and to do this, at times, one may be justified in killing his assailant in self-protection.[17] But a trespasser is not justified in defending himself when he can safely withdraw,[18] nor can a man justify his acts on the ground of self-defense, by introducing evidence of a previous affray entirely independent of and separated from the assault with which he

11. People v. Campbell, 30 Cal. 312, per Rhodes, J. See CRIMINAL LAW.

12. People v. Lewis, 117 Cal. 186, 59 Am. St. Rep. 167, 48 Pac. 1088.

13. People v. Dollor, 89 Cal. 513, 26 Pac. 1086; People v. Angeles, 61 Cal. 188. As to extent to which one may defend himself or his property against the commission of a felony, see CRIMINAL LAW.

14. The Mussel Slough Case, 5 Fed. 680; People v. Rodrigo, 69 Cal. 601, 11 Pac. 481; United States v. Doyle, 5 Fed. 680, 6 Sawy. 612.

15. People v. Denby, 108 Cal. 54, 40 Pac. 1051. See ARREST, ante, p. 134.

16. People v. Rodrigo, 69 Cal. 601, 11 Pac. 481; People v. Angeles, 61 Cal. 188; People v. Charlie, 34 Cal. App. 411, 167 Pac. 703.

17. People v. Lewis, 117 Cal. 186, 59 Am. St. Rep. 167, 48 Pac. 1088. See HOMICIDE.

18. People v. Douglass, 87 Cal. 281, 25 Pac. 417 (holding that a trespasser on a train is not justified in shooting a servant of the railroad company who attempts to put him off, when he can with safety get off and avoid the shooting).

is charged.[19] Mere threats on a previous occasion will not justify a deadly assault, when the party assailed has made no demonstration of a hostile or equivocal character.[20]

§ 24. Right to Eject Trespassers.—The owner of property has the right to use necessary force to prevent a forcible trespass.[1] And so the owner of property in possession of the same has a right to repel by force a trespasser who goes upon the premises with intent and the means to commit a felony if necessary to accomplish the end intended.[2]

Ejecting officer.—It has been held that a debtor has no right to assault an officer, charged with the duty of enforcing a judgment by execution, for the purpose of ejecting him from the premises, when he is entering the house of the execution debtor.[3]

The common-law doctrine that the manager of a place of amusement carried on for profit, which is quasi public in character, has the right to eject a person (even including an officer of the peace) from his premises at his own pleasure, is not the law of this state; and so it has been held that the keeper of a pool and billiard hall has no right to expel a constable, who, as a police officer, is lawfully in such place, and cannot justify an assault upon such officer with a deadly weapon for that purpose.[4] But where an officer, without authority, and without a proper search-warrant, enters upon the premises of an owner, and is therefore a trespasser, the owner has the right to protect his property with an amount of force

19. People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792.

20. People v. Iams, 57 Cal. 115; People v. Wright, 45 Cal. 260 (both were homicide cases).

1. People v. Teixeira, 123 Cal. 297, 55 Pac. 988; People v. Payne, 8 Cal. 341; People v. Ross, 19 Cal. App. 469, 126 Pac. 375.

2. People v. Payne, 8 Cal. 341.

3. People v. Sylva, 143 Cal. 62, 76 Pac. 814. See LEVY AND SEIZURE.

4. People v. McKeehan, 11 Cal. App. 443, 105 Pac. 273.

necessary to prevent the search. In such a case if, in protecting his property, he draws a gun and points it at the officer, telling him to leave the premises, but does not fire it, such act is not an assault with a deadly weapon.[5]

§ 25. Intoxication and Insanity.—It is a rule under the code that

"Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."[6]

But where no specific intent is necessary for the commission of the assault, it is not error to exclude evidence tending to show assailant's condition as to sobriety at the time of the alleged assault.[7] Although voluntary intoxication or drunkenness is no excuse for an assault or other criminal act committed under its influence, yet if one, by reason of long-continued indulgence in intoxicants, has reached that stage of chronic alcoholism where the brain is permanently diseased, and permanent general insanity has resulted, and he is rendered incapable of distinguishing right from wrong, then, and in such case, he is no more legally responsible for his acts than would be the man congenitally insane, or insane from violent injury to the brain.[8] But when partial insanity or insane delusion or hallucination is relied upon as a defense, it must be made to appear that the assault charged was the product or offspring of such insanity, insane delusion or hallucination, and not the result of some sane reasoning and natural motives.[9]

5. People v. Ross, 19 Cal. App. 469, 126 Pac. 375.

6. Pen. Code, § 22. See, generally, CRIMINAL LAW.

7. People v. Marseiler, 70 Cal. 98, 11 Pac. 503.

8. People v. Hower, 151 Cal. 638, 91 Pac. 507; People v. Griffith, 146 Cal. 339, 80 Pac. 68. See CRIMINAL LAW; INSANE PERSONS.

9. People v. Griffith, 146 Cal. 339, 80 Pac. 68. See People v. Davis,

Burden of proof.—As in other criminal cases, the burden of proof is on the defendant where the defense of insanity is relied on, and this rule as to the burden of proof applies as well to unconsciousness of act as well as to insanity.[10] "Burden of proof," however, does not mean "clearly established by satisfactory proof," but established only by a mere preponderance of evidence.[11]

IV. EVIDENCE.

§ 26. In General.—The evidence in trials for assaults should, as in the trial of criminal charges generally, be confined to proof of the allegations contained in the indictment. Thus, where the indictment charges the defendant with assault with a deadly weapon, to wit, a knife, it cannot be shown in evidence that the defendant had a pistol in his possession when arrested.[12]

In proving its case the prosecution or defense may rely upon evidence of acts or declarations of the defendant or of the party assaulted, which were connected so closely with the assault as to form a part of the res gestae.[13] And in addition to introducing evidence of acts and declarations of the parties which formed a part of the res gestae, it is usual to introduce the weapons, if any,

4 Cal. Unrep. 524, 36 Pac. 96 (holding that when a plea of insanity is not set up, and it is not claimed that defendant was an idiot or lunatic when he committed the assault charged, evidence that some ten or twelve years before the trial he had received a violent blow on the head which weakened him both physically and mentally is inadmissible).

10. People v. Wells, 145 Cal. 138, 78 Pac. 470; People v. Nihell, 144 Cal. 200, 77 Pac. 916. See CRIMINAL LAW.

11. People v. Wells, 145 Cal. 138, 78 Pac. 470.

12. People v. Wong Ah Leong, 99 Cal. 440, 34 Pac. 105.

13. People v. Bennett, 37 Cal. App. 324, 173 Pac. 1004; People v. Carson, 155 Cal. 164, 99 Pac. 970 (holding that the testimony of declarations and acts of an alleged conspirator in an assault may be introduced before proof of the conspiracy is made, under the rule that the order of proof is within the discretion of the court). See CRIMINAL LAW.

with which it is alleged the assault was made, and if such weapons are admitted, although not sufficiently identified, no substantial injury will be caused to the defendant when the defendant admits having used similar weapons in the assault.[14] Although not permissible in most criminal cases, in a criminal action for assault by a person upon his wife, it is competent for the wife to testify against her husband.[15]

Cross-examination.—As in criminal cases generally, the cross-examination in cases of assault should be confined to facts brought out in the examination in chief.[16] But within the range of the facts brought out on direct examination the defendant should not be denied the right to freely cross-examine an adverse witness, and particularly is this true in regard to evidence introduced and tending to show malice on defendant's part, or the motive for the act.[17] For the purpose of showing the relations between the parties and the state of feeling of the prosecuting witness, it is competent to show by the witness on cross-examination that he had caused the defendant to be arrested and tried since the assault, on a charge of disturbing the peace, and that the defendant had been acquitted of that charge; but it is error to permit the witness, on re-examination, to state the facts in connection with the latter charge as involved in and brought out at the trial thereof.[18] Where the cross-examination of the defendant in such a case is not confined to the subject matter of his testimony in chief, and the obvious purpose and undoubted effect of the cross-examination is to degrade and injure him in the estima-

14. People v. Grandi, 33 Cal. App. 637, 165 Pac. 1027.

15. See Pen. Code, § 1322; People v. Rader, 24 Cal. App. 477, 141 Pac. 958.

16. People v. Un Dong, 106 Cal. 83, 39 Pac. 12; People v. Wong Ah Leong, 99 Cal. 440, 34 Pac. 105. See CRIMINAL LAW.

17. People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

18. People v. Webster, 89 Cal. 572, 26 Pac. 1080.

tion of the jury, it is not admissible, and is clearly prejudicial.[19]

Burden of proof.—The burden of proof, as in any other criminal charge, remains upon the state throughout the trial, if the defendant relies upon no separate, distinct or independent fact, but confines his defense to the original act on which the charge is founded, with its accompanying circumstances.[20]

§ 27. Intent, Motive and Ability.—The motive with which an assault is committed is always material and a proper subject of inquiry. That it is established by proof of collateral matters prejudicial to defendant does not render the evidence incompetent. Even where the evidence of collateral facts tends to prove the commission of a distinct substantive offense, it is, nevertheless, admissible if it has a direct tendency, in view of the surrounding circumstances, to prove the motive or intent, or other material fact.[1]

Prior threats, raids, quarrels.—Evidence of prior threats to commit bodily violence upon one assaulted,[2] as

19. People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

20. People v. Rodrigo, 69 Cal. 601, 11 Pac. 481. See supra, § 24, for rule in regard to burden of proof where separate or distinct defense is relied upon.

1. People v. Carson, 155 Cal. 164, 99 Pac. 970 (holding that evidence of a conspiracy to attempt an escape from prison, participated in by defendant, and all the circumstances surrounding the effort to accomplish the purpose of the conspiracy, are competent for the purpose of showing the intent with which the defendant, in furtherance thereof, made the particular assault that is charged against him in the indictment). People v. Grow, 16 Cal. App. 147, 116 Pac. 369 (holding that, upon the trial of a defendant prosecuted for an assault with a deadly weapon with intent to murder the prosecuting witness, evidence that defendant was one of many union men engaged in a strike against an employing company, and that the prosecuting witness was a nonunion man employed by the same company, is admissible as tending to show an antagonism of the defendant against the prosecuting witness, and to show a motive for the crime). See, generally, CRIMINAL LAW.

2. People v. Rozelle, 78 Cal. 84, 20 Pac. 36; People v. Rader, 24 Cal. App. 477, 141 Pac. 958.

well as evidence that defendant had on a previous occasion quarreled with and expressed hostility toward the complaining witness, may properly be admitted against the party accused, as tending to show purpose and intent. The objection that such occurrences are too remote from the time of the commission of the offense charged goes to the weight rather than to the admissibility of such evidence.[3] And on a charge of assaulting a police officer, it has been held proper to allow the prosecution to show a raid previously made by the officer on the premises of the accused, in search of liquor, as tending to show intent and motive for the assault.[4] Upon the trial of a charge of aiding and advising the crime of throwing vitriol upon the person of another, if the defendant denies the offense in his testimony in chief, it has been held that he may be cross-examined as to a conversation in which he said he would fix up something that was new for the person injured, which would disfigure him so that he would not want to see another woman.[5]

Rebuttal of showing of motive.—Where, on a trial of a charge of assault with a deadly weapon, the prosecuting witness testified that the only cause of the assault upon him, so far as he knew, was that he was present on a previous occasion when the defendant assaulted another person, and that the witness had informed the officers of such previous assault, and this was assigned as the sole ground for the defendant's malice and the only motive for the subsequent assault, it is very material for the defendant to rebut, if he can, the statements of the witness in this regard, and to show by cross-examination of the witness what the defendant did at the time of the previous assault; and where he is not permitted to do this, it is prejudicial error.[6] Though the drawing

3. People v. Piercy, 16 Cal. App. 13, 116 Pac. 322.

4. People v. McKeehan, 11 Cal. App. 443, 105 Pac. 273.

5. People v. Rozelle, 78 Cal. 84, 20 Pac. 36.

6. People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

of a weapon itself is evidence of the intent, yet that evidence may be rebutted when the act is accompanied with a declaration, or circumstances, showing no intention to use it. But where the party draws the weapon, although he does not directly point it at the other, but holds it in such a position as enables him to use it before the other party can defend himself, at the same time declaring his determination to use it against the other, the jury is fully warranted in finding that such was his intention.[7]

Ability.—It is permissible to introduce evidence tending to show that the pistol was loaded, such as evidence that defendant discharged the pistol after the alleged commission of the assault,[8] or evidence that the pistol was fired and that the hissing of the bullet was heard.[9] However, the question as to whether a gun was loaded is one for the jury.[10]

§ 28. Character Evidence.—In a prosecution for assault, as in most other criminal prosecutions, the state is not permitted to assail the character of a defendant until the defendant himself has put his character in issue by calling witnesses and offering evidence in its support.[11] And so, where the character of the accused is not directly made an issue, it has been held that the refusal to instruct the jury to the effect that a person accused of crime is presumed to have a good moral character until the contrary is established by competent evidence, and that it is the duty of the jury to give the defendant the benefit of such presumption, is not prejudicial, where the jury is instructed that the defendant is to be presumed innocent until his guilt is confirmed by the evidence be-

7. People v. McMakin, 8 Cal. 547.
8. People v. Wells, 145 Cal. 138, 78 Pac. 470.
9. People v. Grandi, 33 Cal. App. 637, 165 Pac. 1027.
10. People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792.
11. People v. Griffith, 146 Cal. 339, 80 Pac. 68.

yond all reasonable doubt.[12] Neither is evidence of similar assaults previously committed by the defendant admissible on his cross-examination, for the purpose of impeaching his character, either generally or for truth and veracity,[13] since testimony as to character should be confined to general reputation of the person in the community in which he resides and is known.[14]

When the defendant offers himself as a witness, he may be impeached as any other witness.[15] And as in the case of other witnesses, it may be shown in such case, that he has been previously convicted of a felony.[16]

V. PROCEDURE.

§ 29. Jurisdiction.—The superior court is the only trial court that has jurisdiction of the offense of assault with a deadly weapon, since by statutory definition it is a felony.[17] However, since it is an offense which necessarily includes within it the offense of assault,[18] and since a person accused of the greater offense may be convicted of the lesser,[19] a conviction of simple assault does not take away or impair the jurisdiction of the superior court where

12. People v. Grandi, 33 Cal. App. 637, 165 Pac. 1027.

13. People v. Bishop, 81 Cal. 113, 22 Pac. 477.

14. People v. Webster, 89 Cal. 572, 26 Pac. 1080 (where a witness for the defense was asked, for the purpose of impeachment of the prosecuting witness, whether he knew his general reputation in the community where he lived for honesty, truth and veracity, and the witness answered that he only knew from what he heard people generally say of him, it is error for the court to rule that he could only testify as to what he knew of his reputation of his own personal knowledge. As to evidence of character generally, see CRIMINAL LAW.

15. Code Civ. Proc., § 2051. See generally, CRIMINAL LAW.

16. People v. Rader, 24 Cal. App. 477, 141 Pac. 958.

17. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449; People v. Fahey, 64 Cal. 342, 30 Pac. 1030.

18. See supra, § 19, as to assault with a deadly weapon.

19. Pen. Code, § 1159. See infra, § 32.

the charge was for a felonious assault, as, for example, with a deadly weapon.[20]

Under earlier decisions of the supreme court it has been held that that court had no jurisdiction in criminal cases except such as amounted to a felony, and that its jurisdiction did not extend to an appeal where the defendant was convicted of an assault, even if he was indicted for a higher offense amounting to a felony.[1] But while under the former ruling the jurisdiction of the supreme court in such cases was determined by the offense of which the defendant was convicted, rather than by the offense charged in the indictment,[2] the test is now the other way.[3]

Jurisdiction of justices' courts.—By the Penal Code it is provided that justices' courts have jurisdiction over "Assault and battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony."[4] By this enactment justices' courts are given jurisdiction in cases of assault; but they have no jurisdiction of the offense of assault with a deadly weapon.[5]

Federal customs officer charged with assault under state law.—Where a deputy collector of United States customs service in the course of his official employment and while endeavoring to stop an automobile in order that a search

20. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449 (stating that defendant may be convicted of any offense within the scope of the information); People v. Fahey, 64 Cal. 342, 30 Pac. 1030. See generally, CRIMINAL LAW.

1. People v. Aubrey, 53 Cal. 427; People v. Apgar, 35 Cal. 389; People v. Cornell, 16 Cal. 187. But see People v. War, 20 Cal. 117, holding that the supreme court had jurisdiction where appeal was taken by the people on a demurrer of the defendant to an indictment for assault with a deadly weapon, since no judgment had been passed which protected the defendant from liability to be punished by imprisonment in the state prison.

2. People v. Apgar, 35 Cal. 389; People v. Cornell, 16 Cal. 187 (where it was held that the jurisdiction of the supreme court on appeal depended upon the nature and extent of punishment, i. e., as felony or misdemeanor).

3. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449; People v. Fahey, 64 Cal. 342, 30 Pac. 1030.

4. Pen. Code, § 1425 (subd. 2).

5. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449.

for contraband might be made, and after due warning to stop had been given, fired shots from his revolver in order to prevent the escape of the automobile and its occupants, and was subsequently arrested on a charge of assault with a deadly weapon under the laws of the state, it has been held that he will be discharged on habeas corpus where it appears that he has committed no crime and where it appears that the business of the government of the United States in which he was engaged will be unduly interfered with through his detention or compulsory attendance upon other than federal tribunals.[6]

§ 30. Indictment and Information.—It is a general rule that an assault with a deadly weapon may be charged in the language of the statute,[7] the kind of weapon used being a matter of proof only.[8]

6. Ex parte Beach, 259 Fed. 956, (following the rule laid down by the supreme court of the United States in Re Neagle, 135 U. S. 1, 34 L. Ed. 55, 10 Sup. Ct. Rep. 658, see, also, Rose's U. S. Notes).

7. People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74; People v. Perales, 141 Cal. 581, 75 Pac. 170; People v. Savercool, 81 Cal. 650, 22 Pac. 856; People v. Forney, 81 Cal. 118, 22 Pac. 481 (holding that an information for an assault with a deadly weapon, which alleges that the assault was committed "upon the person of one John Coffey," sufficiently shows that a human being was the subject of the assault); People v. Pape, 66 Cal. 366, 5 Pac. 621 (where the information charged that a tin box filled with gunpowder was a deadly weapon, the court held that the important part of the averment was that the weapon was deadly); People v. Turner, 65 Cal. 540, 4 Pac. 553 (holding that it is sufficient to charge the offense in the language of the statute, and by parity of reasoning it is sufficient for the jury to find in the language of the charge). People v. Vierra, 52 Cal. 451. An averment that the defendant was armed with a deadly weapon and made an assault is no statement of the fact that the assault was with the weapon. He may have been thus armed and yet have committed a simple assault, or an assault with some other instrument not deadly in its character. People v. Congleton, 44 Cal. 92; Ex parte Ah Cha, 40 Cal. 426; People v. Jacobs, 29 Cal. 579. A statement that defendant assaulted the person of another with intent to inflict bodily injury, "with a certain pistol," is defective in that it does not state that the pistol is a deadly weapon. People v. War, 20 Cal. 117; People v. Vanard, 6 Cal. 562; People v. Nugent, 4 Cal. 341; People v. Weir, 10 Cal. App. 460, 102 Pac. 539.

8. People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74. (Under an

But this rule is subject to the qualification that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. Section 245 of the Penal Code, defining assault with a deadly weapon, affords an example of the application of the rule that it is sufficient to plead in the language of the statute, where the words of the statute have a precise and definite meaning, as well as an example of the application of the rule that where the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, it is then necessary to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness. Accordingly, if the charge in the indictment is that the assault was made with a "deadly weapon"—that term having a precise and well-recognized meaning in the law—it is sufficient to plead such assault in the language of the statute. But if the assault is "by any other means of force" likely to produce great bodily injury, the indictment or information should specify the particular means used. In the latter case the information should conform to those rules of criminal pleading which require that the information shall contain a statement of the acts constituting the offense.[9]

information charging assault "with a deadly weapon," it is permissible to show that two weapons were used. Such showing constitutes an unprejudicial variance between the information and proof); People v. Savercool, 81 Cal. 650, 22 Pac. 856 (where the information charges an assault with a "deadly weapon" as the statute prescribes, it is unnecessary to describe it further as, "to wit, a revolver"); People v. Turner, 65 Cal. 540, 4 Pac. 553; People v. Weir, 10 Cal. App. 460, 102 Pac. 539 (an information alleging "an assault with a deadly weapon, to wit, a large shovel," is sufficient).

9. People v. Perales, 141 Cal. 581, 75 Pac. 170 (holding that an information charging defendant generally with the crime of assault "by means likely to produce great bodily injury, to wit, a heavy wooden stick," is not a sufficient designation of the offense. The word "heavy" is too indefinite as to weight, strength or size of stick, or

The ultimate or issuable facts which the statute declares to constitute the offense are to be pleaded substantially in the language of the law. While probative facts, such as the intent with which an assault is made, and the "present ability" to do it must be proved, they need not be alleged in the information or indictment.[10]

Naming person assaulted and accused.—The name of the party assaulted is a material element of the offense of an assault with a deadly weapon, and where the complaint charges the assault to have been made upon one person and the information charged it to have been made upon another person, the variance is fatal.[11] Likewise, the name of the defendant should accord in the proof with his name in the information, but the court is the judge as to whether there is such a variance.[12]

ability of person wielding it); People v. Martin, 47 Cal. 112 (holding that where the indictment charges the defendant with the "crime of assault with intent to do bodily harm upon the person of another," simple assault only is charged); People v. Murat, 45 Cal. 281 (holding that the nature of the weapon as being deadly or otherwise is alone important, and it is essential to aver it in some appropriate way to have been deadly in its character); People v. Jacobs, 29 Cal. 579; People v. Brown (Cal. App.), 183 Pac. 829 (where the indictment contains allegations as to the force with which a certain "rawhide whip" was used, together with the particular circumstances of the offense, such allegations are sufficient to charge the offense as defined by section 245 of the Penal Code). See Pen. Code, §§ 950–952; and generally, INDICTMENT AND INFORMATION.

10. People v. Savercool, 81 Cal. 650, 22 Pac. 856; People v. Forney, 81 Cal. 118, 22 Pac. 481; People v. Turner, 65 Cal. 540, 4 Pac. 553; People v. Nugent, 4 Cal. 341 (a bare negative qualification in a statute, need never be averred, but must be relied on as a matter of defense in the progress of the trial).

11. People v. Christian, 101 Cal. 471, 35 Pac. 1043 (in this case the complaint charged the assault to have been made upon one "George Magin," and the information charged it to have been made upon the person of one "George Masino").

12. People v. Douglass, 87 Cal. 281, 25 Pac. 417 (whether in the information the name of the person assaulted was written therein "Daniel Auseon" or "Daniel Anseon" was for the trial court to determine, and the trial court having directed the jury that the name written in the information was Daniel Auseon, a court of appeal will not revise the action of such court in so holding).

Immaterial misnomer of the offense.—The fact that the indictment and verdict designated the offense of "an assault with intent to commit murder," as being "an assault with a deadly weapon, with intent to commit murder," is immaterial. By placing the words "with a deadly weapon" in the indictment, the people were limited to proving that particular kind of assault, and the defendant was informed of the particular kind of assault which he must meet. If those words were surplusage, they did not vitiate the indictment or verdict.[13]

Assault by life prisoner.—In charging the particular crime of assault with a deadly weapon by a life prisoner it is sufficient to charge the offense in the language of the statute, and it is not necessary to allege that the defendant was sentenced to life imprisonment in the state prison by a court of competent jurisdiction, but it is sufficient to allege that defendant was then and there a person confined in and undergoing a life sentence at the state prison.[14]

Aiding and abetting assault with caustic chemicals.—An information charging a defendant with encouraging and advising, and also with aiding, assisting and procuring, his wife to throw vitriol upon the person of another, is not demurrable, because it does not state whether, being present, he aided and abetted, or, not being present, he advised and encouraged, the commission of the crime, since, if he aided and abetted the assault, whether present or absent, he is a principal under the statute.[15]

Complaint in justices' courts.—A complaint charging a misdemeanor cognizable in justices' courts is sufficient not only to confer jurisdiction but for every purpose, under section 1426 of the Penal Code, if it is made under oath and sets forth "the offense charged with such particulars of

13. People v. Owens, 3 Cal. App. 750, 86 Pac. 980.

14. People v. Finley, 153 Cal. 59, 94 Pac. 248.

15. People v. Rozelle, 78 Cal. 84, 20 Pac. 36.

time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint." Where the complaint clearly charges a simple battery—a case within the jurisdiction of the justice's court—and it charges it with the particulars of time and place and person, it discloses the character of the offense charged, and enables defendant to answer the complaint.[16]

§ 31. Instructions.—As in criminal cases generally, the jury in a prosecution for an assault of a felonious nature should be instructed in the law bearing upon the facts of the case.[17] They should be instructed that the proof should show the commission of the offense beyond all reasonable doubt, and that the presumption of innocence attaches at every stage of the case, and to every fact essential to a conviction.[18] It is for the jury to determine what is the substance and effect of the testimony; and it is an invasion of their province, and a violation of the constitutional prohibition, for the judge to state his impression of the substance and effect of the testimony of the prosecuting witness, without properly stating its contents, and to tell them that other witnesses corroborate, in whole or in part, certain statements of the prosecuting witness in regard to the commission of the assault.[19] And where the charge is assault with a deadly weapon with intent to commit murder, the question of

16. Matter of Application of Winston, 160 Cal. 18, 116 Pac. 390.

See Pen. Code, § 1425, which provides that "The justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established: (2) Assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony."

17. People v. Stanton, 106 Cal. 139, 39 Pac. 525. See CRIMINAL LAW.

18. People v. Bennett, 37 Cal. App. 324, 173 Pac. 1004.

19. People v. Gordon, 88 Cal. 422, 26 Pac. 502.

the intention of the defendant to murder is one of fact for the jury.[20]

On a trial for an assault with a deadly weapon by a life prisoner in the state prison, and where, upon conviction, the sentence of death may be imposed, it is incumbent upon the court to instruct the jury fully as in cases of homicide generally.[1] But in such a case it has been held that an instruction to the jury that "if the testimony in this case is sufficient to convince you, beyond a reasonable doubt and to a moral certainty, that the defendant did commit the act charged, although the fact be surrounded, in a degree, by a doubt, then it is your duty to convict," although open to criticism, if standing alone, for its failure to define what does and what does not constitute reasonable doubt, will not be deemed prejudicial, if the court, in other instructions given in the same connection, clearly and correctly charges on the subject matter of reasonable doubt.[2]

§ 32. Verdict of Conviction.—"The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."[3] Thus the offense of assault with a deadly weapon is necessarily included in that of an assault with intent to commit murder;[4] and where the charge is assault with a deadly weapon, the jury may return a verdict of simple assault.[5]

It is a general rule that a verdict, in general terms, finding the defendant guilty of an assault with a deadly weapon under an information charging that the assault was made upon a person named, is in accordance with law, and free from uncertainty.[6]

20. People v. Owens, 3 Cal. App. 750, 86 Pac. 980.

1. See CRIMINAL LAW; HOMICIDE.

2. People v. Swearningen, 168 Cal. 53, 141 Pac. 822.

3. Pen. Code, § 1159.

4. See infra, this section.

5. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449; People v. Holland, 59 Cal. 364; People v. Aubrey, 53 Cal. 427.

6. People v. Douglass, 87 Cal.

Assault with deadly weapon under charge of assault with intent to commit murder, etc.—Where the offense charged is assault with a specific intent, such as murder, robbery, etc., the defendant may, if the evidence justifies it, be convicted, pursuant to section 245 of the Penal Code, of an assault with a deadly weapon, or by means or force likely to produce great bodily injury.[7] It has been held, however, that under an indictment or information for an assault with intent to commit murder which does not charge that the assault was made with a deadly weapon, the defendant cannot be convicted of an assault with a deadly weapon.[8] Under such an indictment or

281, 25 Pac. 417; Ex parte Mitchell, 70 Cal. 1, 11 Pac. 488 (holding that such a verdict is sufficient to support a judgment of imprisonment in the state prison); People v. English, 30 Cal. 214 (a verdict finding the defendant "guilty of an assault with a deadly weapon with intent to inflict a bodily injury" is sufficient to sustain a judgment subjecting the accused to confinement in the state prison).

7. People v. Watson, 125 Cal. 342, 57 Pac. 1071 (where the court instructs the jury that it must find the defendant guilty of assault with a specific intent, as charged, or of assault, or not guilty, such instruction is erroneous, since it excludes assault with a deadly weapon, of which the defendant may be convicted if the evidence justifies it); People v. Gordon, 99 Cal. 227, 33 Pac. 901 (charge of assault with intent to commit murder necessarily includes offense of assault with a deadly weapon); People v. Bentley, 75 Cal. 407, 17 Pac. 436 (conviction of assault with a deadly weapon upheld upon an information charging with assault to commit murder); People v. Pape, 66 Cal. 366, 5 Pac. 621 (where, in charge of assault with intent to murder, the deadly character of the instrument used was alleged); People v. Turner, 65 Cal. 540, 4 Pac. 553 (where the party is indicted for an assault with intent to commit murder, and a verdict is rendered against him for an assault with a deadly weapon, the verdict was held sufficient to support a judgment for imprisonment in the state prison without stating that the assault was made with intent to commit great bodily injury); People v. Lightner, 49 Cal. 226; People v. Congleton, 44 Cal. 92; People v. Apgar, 35 Cal. 389 (conviction of lesser offense is acquittal of all higher offenses within the charge); People v. English, 30 Cal. 214; People v. Wilson, 9 Cal. 259; People v. Delucchi, 17 Cal. App. 96, 118 Pac. 935; People v. Romero, 17 Cal. App. 680, 121 Pac. 698.

8. People v. Arnett, 126 Cal. 680, 59 Pac. 204. See same case on later appeal, 129 Cal. 306, 61 Pac. 930, where it was held that a void verdict for assault with a deadly

information, a verdict finding the defendant guilty of an assault with a deadly weapon cannot be construed as finding the defendant guilty of only a simple assault; and the fact that the defendant asked for an erroneous instruction under which the jury may have found such a verdict is said to make no difference.[9] However, if a defendant is charged with assault with a specific intent, and an instruction is given at his request to the effect that the jury must find the defendant guilty as charged, or not guilty, he cannot be heard later to complain that the court failed to instruct the jury that the lesser crime of assault was embraced in the charge.[10] And where assault with a specific intent is charged in the indictment, and the evidence shows that if the assault was committed at all it was committed as charged, it is not error for the court to refuse to charge the jury that it can convict of a lesser offense than the one charged.[11]

weapon constitutes no legal reason for a discharge of the jury without the consent of the defendant, and that where such discharge of the jury has been made, the defendant upon a second trial is entitled to a plea of once in jeopardy and a former acquittal. See People v. Murat, 45 Cal. 281 (holding that an assault made with intent not to do murder but only to do a lesser bodily harm is not constituted a felony, unless such an assault was made with a deadly weapon or by resort to means of a deadly nature), and People v. Vanard, 6 Cal. 562 (where the defendant was indicted for "an assault with intent to commit murder," and where a verdict of "guilty of an assault with the intent to do bodily injury" was held to be a verdict of simple assault only).

9. People v. Arnett, 126 Cal. 680, 59 Pac. 204. See Ex parte Max, 44 Cal. 579 (holding that a verdict on an indictment for assault with intent to commit murder, finding the defendant guilty of assault to do great bodily harm, is a verdict for a misdemeanor only, and that such verdict cannot be amended to a verdict of guilty of assault with a deadly weapon).

10. People v. Hite, 135 Cal. 76, 67 Pac. 57.

11. People v. Swist, 136 Cal. 520, 69 Pac. 223; People v. Lopez, 135 Cal. 23, 66 Pac. 965; People v. Gomez, 118 Cal. 326, 50 Pac. 427; People v. Arnold, 116 Cal. 682, 48 Pac. 803; People v. McNutt, 93 Cal. 658, 29 Pac. 243; People v. Madden, 76 Cal. 521, 18 Pac. 402; People v. Guidice, 73 Cal. 226, 15 Pac. 44.

In case of assault by life-convict.—Under an information charging a life prisoner with assaulting with a deadly weapon under section 246 of the Penal Code, conviction can be had only as charged in the information, and the verdict must be guilty or not guilty as charged. The proof must measure up beyond a reasonable doubt to the exact charge as contained in the information, and unless it does so, the defendant is entitled to a verdict of not guilty, and cannot be convicted of assault, or assault with a deadly weapon.[12]

§ 33. Sentence and Punishment.—It is provided by the code that:

"An assault is punishable by fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months, or by both."[13]

And further that

"A battery is punishable by fine of not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both."[14]

Since a simple assault is punishable by fine or imprisonment in the county jail, it is a misdemeanor;[15] and a battery is also a misdemeanor by the code definition.[16] The crime of assault with a deadly weapon is a felony where a conviction is followed by a sentence of imprisonment in the state prison;[17] but the crime of assault with

12. People v. Carson, 155 Cal. 164, 99 Pac. 970.

13. Pen. Code, § 241.

14. Pen. Code, § 243.

15. See Pen. Code, § 17, defining felony and misdemeanor; and see infra, this section, and supra, § 18, as to assaults as misdemeanors.

16. Ex parte Kelly, 65 Cal. 154, 3 Pac. 673.

17. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449; People v. Munn, 65 Cal. 211, 3 Pac. 650; People v. Fahey, 64 Cal. 342, 30 Pac. 1030; People v. Helbing, 61 Cal. 620 (holding that since the offense is a felony, the statute of limitations as to misdemeanors does not apply); People v. Murat, 45 Cal. 281; People v. War, 20 Cal. 117. And see supra, § 18.

a deadly weapon is reduced to a misdemeanor when the court imposes a fine as punishment.[18]

Sentence.—Imprisonment in state prison can be directed only in case the assault amounts to a felony,[19] and where imprisonment in the state prison is the penalty, a fine cannot be imposed as an additional penalty.[20] However, on conviction of an assault with a deadly weapon with intent to commit a felony, the court may lawfully sentence the offender to pay a fine, and may further direct that he be imprisoned in the county jail until the fine be satisfied, "such imprisonment not to exceed one day for every two dollars of the fine."[1]

As in other cases, the accused cannot be imprisoned longer than the maximum statutory period, when convicted of assault or battery, either by the original sentence of the court,[2] or for the judgment of a fine imposed by the court.[3] Nor can he, where convicted of assault, be imprisoned for the costs.[4] Where the statute provides for the alternative punishments of either fine or imprisonment, a person convicted of assault cannot be punished by both fine and imprisonment.[5] However, a sentence which is illegal in part is not void so as to authorize a

18. People v. Vanard, 6 Cal. 562; In re Sullivan, 3 Cal. App. 193, 84 Pac. 781.

19. Ex parte Arras, 78 Cal. 304, 20 Pac. 683; People v. Wilson, 9 Cal. 259 (since the verdict was for the simple offense of assault, a sentence of two years' imprisonment in the state prison is erroneous); People v. Vanard, 6 Cal. 562; In re Sullivan, 3 Cal. App. 193, 84 Pac. 781.

20. Ex parte Arras, 78 Cal. 304, 20 Pac. 683.

1. Ex parte Kelly, 28 Cal. 414 (holding that defendant is entitled to a credit upon his fine of two dollars for each day spent in prison after sentence).

2. Ex parte Bulger, 60 Cal. 438.

3. Ex parte Erdmann, 88 Cal. 579, 26 Pac. 372. After the expiration of the maximum term of imprisonment, the accused is entitled to a discharge on habeas corpus.

4. Ex parte Gilmore, 71 Cal. 624, 12 Pac. 800 (holding that if such a sentence be imposed, the superior court has power, within a reasonable time, to vacate it, and impose one in accordance with law); Petty v. San Joaquin County Court, 45 Cal. 245.

5. See Ex parte Kelly, 65 Cal. 154, 3 Pac. 673, holding that a sentence imposing labor as an alternative for a money fine is void.

discharge on habeas corpus before the legal part is satisfied.[6]

Order to give security.—A person who, in the presence of a court or magistrate, assaults or threatens to assault another, may be ordered by the court or magistrate to give security, and if he refuses to do so, may be committed to prison.[7]

Effect of acquittal.—Under the rule that the defendant is acquitted of the higher offense with which he is charged, when found guilty of a lesser offense,[8] the finding the defendant guilty of assault with a deadly weapon acquits him of the charge of attempt to commit murder.[9] However, upon a trial for assault, the defendant cannot be convicted of battery, since battery is the greater offense. A conviction of battery on a charge of assault may be set aside, and constitutes no bar to a second trial on the same indictment or information.[10]

6. Ex parte Mitchell, 70 Cal. 1, 11 Pac. 488 (holding that the punishment for an assault with a deadly weapon, provided for by section 245 of the Penal Code, is not excessive, cruel or unusual, within the meaning of section 6 of article I of the constitution); In re Sullivan, 3 Cal. App. 193, 84 Pac. 781. See CRIMINAL LAW.

7. Pen. Code, § 710. See CONTEMPT.

8. See supra, § 32; and generally, see CRIMINAL LAW.

9. People v. Gordon, 88 Cal. 422, 26 Pac. 502.

10. People v. Helbing, 61 Cal. 620 (holding that to entitle a defendant to the plea of autrefois convict or acquit, it is necessary that the offense charged be the same in law and in fact).

(S. W. S.)

ASSESSMENTS.

See MUNICIPAL CORPORATIONS; TAXATION.

ASSIGNMENT OF ERRORS.

See APPEAL AND ERROR.

ASSIGNMENTS.

I. INTRODUCTORY.
II. INTERESTS AND RIGHTS ASSIGNABLE.
III. EQUITABLE ASSIGNMENTS.
IV. FORMAL REQUISITES AND VALIDITY.
V. OPERATION AND EFFECT.
VI. ACTIONS.

I. Introductory.

1. Definition and Scope of Article.
2. Distinguished from Other Transactions.

II. Interests and Rights Assignable.

CONTRACTUAL INTERESTS.

3. In General.
4. Intention—Stipulations in Respect to Assignability.
5. Choses in Action.
6. Contracts in Restraint of Trade.
7. Governmental and Municipal Contracts and Claims.
8. Contracts for Personal Services.
9. Wages and Salaries.
10. Salaries and Fees of Public Officers.

CONTINGENT INTERESTS.

11. Contingencies and Possibilities Generally.
12. Expectancies of Heirs.

CHOSES IN ACTION RELATING TO REALTY.

13. Land Warrants and Certificates of Purchase.
14. Options—Servitudes.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 193 Pac.

CHOSES IN ACTION FOR TORTS.

15. In General.
16. Mere Right to Bring Bill in Equity.

III. Equitable Assignments.

17. In General.
18. Implied by Operation of Law.
19. Form and Requisites.

IV. Formal Requisites and Validity.

IN GENERAL.

20. Parol Assignments—Written Assignments.
21. Delivery of Instrument of Assignment—Thing Assigned.
22. Assignments by Power of Attorney.
23. Description.
24. Consideration.

NOTICE AND CONSENT.

25. Necessity and Effect of Notice.
26. Form and Sufficiency of Notice.
27. Consent of Debtor.

PARTIAL ASSIGNMENTS AND ORDERS.

28. Rules Generally.
29. Rule in Equity.
30. Orders on Whole of Particular Fund.

V. Operation and Effect.

IN GENERAL.

31. Rights and Securities.
32. Incidental Rights.
33. Imposing Liability on Assignee.
34. Rules as to Construction.

EQUITIES AND PRIORITIES.

35. Priorities of Successive Assignees.
36. Priorities Between Assignee and Garnisheeing Creditor of Assignor.
37. Equities Available Against Assignees.

38. Latent Defects—Equities of Third Persons.
39. Equitable Estoppel in Favor of Assignee.

VI. Actions.

In General.

40. By Assignor.
41. By Assignee.
42. By Partial Assignee.
43. Suit by Assignee in His Own Name.
44. Substitution—Assignments Pendente Lite.

Pleadings.

45. In General.
46. Averments as to Assignment.
47. Answers and Defenses.

Evidence, Trial and Judgment.

48. Evidence in General.
49. Sufficiency of Proof.
50. Burden of Proof.
51. Presumptions.
52. Parol Evidence Rule.
53. Findings.
54. Judgment.

I. Introductory.

§ 1. Definition and Scope of Article.—A transfer is defined by the Civil Code as "an act of the parties, or of the law, by which the title to property is conveyed from one living person to another."[1] While the term "assignment" may be used as synonymous with transfer as thus defined,[1a] in ordinary legal usage it is often limited and applied only to the transfer of title or ownership of

1. Civ. Code, § 1039.

1a. Enscoe v. Fletcher, 1 Cal. App. 659, 82 Pac. 1075 (to the effect that an assignment is but a written transfer, resting, as does any other transfer, upon acts of parties to a contract); Estate of Spreckels, 5 Cof. Prob. Dec. 311.

choses in action.[2] And it is in this restricted and limited meaning as the transfer of a chose in action that the subject of assignments will be discussed in this article.

A "thing in action" is defined by the code, "as a right to recover money or other personal property by a judicial proceeding."[3] To "assign," in ordinary legal usage, as applied to choses in action, is to transfer the title or ownership.[3a] An assignment is thus in fact a transfer of a right to a thing and also the right to reduce it to his possession or to recover it by judicial proceedings. As thus used, assignment refers to a class of acts by which the right or title to something of value is transferred to another before the object of the transfer has become property in possession.[4] A right under a contract express or implied which has not been reduced to possession is, therefore, an assignable chose in action.[5] But if the right has been reduced to possession, there is nothing left to transfer, and an assignment passes no property or right of property.[6]

Scope of article.—Since the subject of assignments runs into and is connected with many other branches of the law, it is obviously necessary to limit our discussion. In this article will be considered the kinds, nature and incidents of assignments, the property and interests that are assignable, the formal requisites and validity of assignments, their operation and effect, and the subject of actions. It will not include assignments by or to partic-

2. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518 (affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042); Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94.

3. Civ. Code, § 953; Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Belden v. Farmers etc. Bank, 16 Cal. App. 452, 118 Pac. 449; Reios v. Mardis, 18 Cal. App. 276, 123 Pac. 975.

3a. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518 (affirming 32 Cal. App. 337, 162 Pac. 1042); Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962.

4. See infra, § 2, as to distinctions.

5. Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94. See infra, § 3, as to contracts in general; and infra, § 5, as to choses in action.

6. Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94.

ular classes of persons, or persons in particular relations;[7] assignments for the benefit of creditors;[8] transfers made by debtors for the purpose of defrauding their creditors;[9] transfers in violation of the bankruptcy or insolvency laws;[10] or transfers of particular kinds of property and rights.[11]

§ 2. Distinguished from Other Transactions.—The general nature and character of an assignment is perhaps better understood by comparing or contrasting it with other transactions involving the transfer of obligations and property rights. In general, it may be said that the effect of an assignment is to transfer all the interest of a chose in action to the assignee, including all securities, rights incidental thereto, and rights and remedies essential to its enforcement.[12]

Executory contract.—Since an assignment is a present immediate transfer of a right or interest, it is easily distinguished from an executory contract, which looks to future performance by the parties. An assignment is in effect an executed transaction.[13] An agreement to pay the plaintiff's debt out of a particular judgment provided the plaintiff's name is used, and a recovery had, does not constitute either a total or a partial assignment, since it transfers no present interest.[14] But a present agreement to transfer the title to property to be acquired in the

7. See EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INFANTS; INSANITY.

8. See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

9. See FRAUDULENT CONVEYANCES.

10. See BANKRUPTCY; INSOLVENCY.

11. See ALIMONY; BANKS; BILLS AND NOTES; BONDS; CHATTEL MORTGAGES; CHECKS; DEEDS; FRANCHISE; GOODWILL; JUDGMENT; LANDLORD AND TENANT; LIENS; PATENTS; PLEDGES; SALES; TRADEMARKS AND TRADE NAMES; TRUSTS; WORK AND LABOR.

12. See infra, §§ 31, 32.

13. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518 (affirming 32 Cal. App. 337, 162 Pac. 1042); Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962, holding that there can be no revocation or subsequent assignment which can affect the legal title of the prior assignee.

14. Ritter v. Stevenson, 7 Cal. 388.

future may be enforced in equity as an equitable assignment. The assignee is considered as acquiring a right to get the property when it falls into possession, and this right will be protected in equity when it is based upon an adequate consideration.[15]

Mortgage.—It is a rule in California that a mortgage does not transfer title, but merely creates a lien in favor of the mortgagor.[16] And it is also a rule under the code that a transfer of an interest in property, other than in trust, made only as security for the performance of an act, is to be deemed a mortgage.[17] Pursuant to these rules it has been held that an assignment of a chose in action as security for the repayment of money advanced to the assignor constitutes a mortgage.[18]

Lease.—An assignment differs from a lease in that an assignment is a transfer of the whole interest of the assignor, the assignee standing in his place, whereas, by a lease, a lessor parts with an interest less than his own, thereby reserving a reversion.[19] Observing the distinction between an assignment and a subletting, the rule is given that a covenant against assigning will be strictly construed and will not be held to prohibit a subletting.[20]

Novation.—A novation is a substitution of a new obligation for an existing one.[1] Hence, the effect of a novation is essentially different from that of an assignment. While an assignor may assign the benefits of a contract, he cannot assign its burdens without the consent of the other party.[2] The assignor stands in the relation of a surety for the performance of the obligations by the

15. Bridje v. Kedon, 163 Cal. 493, 126 Pac. 149. See infra, §§ 17, 18.

16. Civ. Code, § 2924. See MORTGAGES.

17. Civ. Code, § 2924.

18. Works v. Merritt, 105 Cal. 467, 38 Pac. 1109 (book account). Polhemus v. Trainer, 30 Cal. 685.

19. Smiley v. Van Winkle, 6 Cal. 605.

20. Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751.

1. Civ. Code, § 1530. See NOVATION.

2. Civ. Code, § 1457. See infra, § 33.

assignee, and he may maintain an action against the assignee for failure to fulfill the terms of the contract.[3] A novation may of course be effected by an assignment with the consent of all the parties.[4] But an agreement to pay the debt of another, though supported by a consideration but not assented to by the creditor, does not constitute an equitable assignment of the debt to the creditor.[5]

Will.—As the effect of an assignment is to create a present transfer of title, it is the opposite of a will, which does not become operative until after the death of the testator.[6] So, where an instrument purports to make a present disposition of a chose in action, and this view is confirmed by the circumstances attending its execution and delivery, it will be construed as a present assignment of the claim, and not as a testamentary disposition to take effect only at the death of the signer of the instrument.[7]

II. INTERESTS AND RIGHTS ASSIGNABLE.

Contractual Interests.

§ 3. In General.—The rule of the early common law as to assignability of choses in action has been much changed in modern times.[8] Thus, the Civil Code provides that written contracts "for the payment of money or personal property" may be transferred by indorsement in the same manner as negotiable instruments.[9] It is

3. Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52.

4. Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979.

5. McLaren v. Hutchinson, 18 Cal. 80. See infra, § 17, as to equitable assignments.

6. See WILLS.

7. McCloskey v. Tierney, 141 Cal. 101, 99 Am. St. Rep. 33, 74 Pac. 699.

8. La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42. And see cases and references infra. Under the code there is no limitation upon the power to assign choses in action. Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962.

9. Civ. Code, § 1459. See infra, this section, as to assignment of

also provided that: "A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such."[10] And by sections 1044 and 1045 of the Civil Code, every species of property, except a mere possibility not coupled with any interest, may be transferred.[11]

These provisions are very comprehensive, and render assignable, contracts and matters arising ex contractu,[12]

negotiable instrument; and as to transfer by indorsement of negotiable instrument, see NEGOTIABLE INSTRUMENTS.

10. Civ. Code, § 1458; Simmons v. Zimmerman, 144 Cal. 256, 79 Pac. 451; La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 42; Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091; Belden v. Farmers etc. Bank, 16 Cal. App. 452, 118 Pac. 449; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820; Gibbs v. Tally, 6 Cal. Unrep. 621, 63 Pac. 168; Henderson v. Henshall, 54 Fed. 320.

11. Chandler v. Hart, 161 Cal. 405, 119 Pac. 516; New Liverpool etc. Co. v. Western etc. Co., 151 Cal. 479, 91 Pac. 152; Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252. See supra, § 1, for references to articles discussing transfers of particular kinds of property and rights. And see infra, § 11, as to "mere possibility" not coupled with an interest.

12. Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786 (applying rule to judgment). Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52 (contract of purchase and sale). La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42 (rule applied to contract for purchase and sale of future crops to be produced on land of vendor); Jones v. Chalfant, 55 Cal. 505 (judgment); Hobbs v. Duff, 23 Cal. 596 (judgment); Gray v. Garrison, 9 Cal. 325; California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 Pac. 1082 (money due on contract of guaranty for rent reserved under a lease); Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091 (money due on guaranty of rent reserved under lease); Culver v. Newhart, 18 Cal. App. 614, 123 Pac. 975 (money due on open, current and mutual account); Belden v. Farmers' etc. Bank, 16 Cal. App. 452, 118 Pac. 449 (rule applied to assignment of money to become due under a lease); Pedley v. Doyle, 177 Cal. 284, 170 Pac. 602 (an assignment does not destroy the mutuality of an account); Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962 (judgment); Young v. Pedrara Onyx Co., 32 Cal. App. Dec. 439, 192 Pac. 55 (corporate stock); Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820. See Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024 (holding that the right to avoid a contract between a corporation and its directors must be exercised by the corporation itself or a stock-

including actions for breach of a contract,[13] or for its specific performance.[14] But these provisions of the Civil Code cannot be so construed, however, as to render assignable all contracts whatever, regardless of their nature or effect; they must be taken with some qualification.[15] And it is only the benefit of the contract which can be assigned. Where there is a burden, it cannot be assigned without the consent of the other party.[16]

Transfer of negotiable instruments.—In order to entitle one to the rights of an indorsee, a negotiable promissory note can be transferred at law only by indorsement and delivery, and the indorsement must be made by writing the owner's name either upon the back of the note or upon a separate writing so attached as to become a part of the note.[17] If there be an assignment thereof without an indorsement, the holder will thereby acquire only such rights as he would acquire upon an assignment of a note not negotiable.[18] And while the transfer of a negotiable instrument may be insufficient under the law as a transfer by indorsement, it may nevertheless operate as an

holder acting for it, and cannot be transferred to another).

13. Shively v. Semi-Tropic Land & W. Co., 99 Cal. 259, 33 Pac. 848; Walton v. Davis, 22 Cal. App. 456, 134 Pac. 795.

14. Tutt v. Davis, 13 Cal. App. 715, 110 Pac. 690.

15. La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42.

16. La Rue v. Groezinger 84 Cal. 281, 24 Pac. 42; Civ. Code, § 1457. See infra, § 33.

17. See Civ. Code, § 3110, and NEGOTIABLE INSTRUMENTS.

18. Hays v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447. See Hart v. Church, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296, where it was said by Justice McFarland in his concurring opinion: "This decision is not to be taken as authority one way or the other on the question whether or not one, knowing the facts, who takes a note which, though negotiable in form is secured by mortgage, is in the position of an indorsee in due course of negotiable paper, and can avoid equities existing between the original parties. That question was not raised in this case. It was raised in Hays v. Plummer, supra, but was not there determined." See infra, § 37, as to equities available against assignee.

equitable assignment of the note and the indebtedness represented thereby.[19]

§ 4. Intention—Stipulations in Respect to Assignability. Whether or not a given contract is assignable may be a question of the intention of the parties to be determined by construction of the terms of the contract.[20] Thus, a contract is not to be held assignable where the parties expressly stipulate to the contrary;[1] or where its language excludes the idea of performance by another;[2] or where it was entered into because of the special knowledge, skill or ability of the party,[3] or in reliance upon his credit and solvency, and where a performance by another would be an essentially different thing from that contracted for.[4] But after performance of an executory contract of this character, a cause of action for money due thereon may be assigned.[5]

Stipulations against assignment.—Sections 1044, 1458, and 1459 of the Civil Code are not to be construed as rendering contracts assignable against the express stipulations of the parties to the contrary. Hence where the contract expressly states that it is nonassignable, the intention of the parties will be enforced by the courts.[6]

19. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Lucas v. Pico, 55 Cal. 126 (name of assignee left blank). See infra, § 17 et seq., as to equitable assignments.

20. Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305 (discussing and applying rules of construction); La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42; Estate of Webb, 49 Cal. 541 (letters from a deceased person to his sisters held not intended to operate as an equitable assignment); Royal v. Dennison, 4 Cal. Unrep. 851, 38 Pac. 39.

1. See infra, this section, as to stipulations against assignment.

2. La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42.

3. See infra, § 8.

4. Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305.

5. Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51.

6. La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42; Davis v. Rawhide Gold Min. Co., 15 Cal. App. 108, 113 Pac. 898.

Leases, and the tickets usually issued by railroad companies, are familiar examples of this.[7]

But a stipulation against assignment goes only to the performance of the terms of the contract and hence does not prevent an assignment of the money due or to become due upon work which the contractor may perform as security for money advanced by the assignee to the contractor.[8] And neither does such a stipulation forbid the assignment of a cause of action for breach of the terms of the agreement.[9] A stipulation against nonassignment of a contract may of course be waived by express agreement or by the conduct of the parties.[10]

§ 5. Choses in Action.—According to the early common law, a chose in action except in cases within the law-merchant, could not be assigned so as to permit the assignee to bring an action thereon at law.[11] The rule is said to have been based largely on consideration of public policy to prevent champerty and maintenance, but the doctrine of champerty has never prevailed in California.[12]

The modern idea is to encourage freedom of alienation of property.[13] And the Civil Code specifically provides:

"A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it

7. La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42.

8. Butler v. San Francisco Gas etc. Co., 168 Cal. 32, 141 Pac. 818 (building contract); Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154 (building contract).

9. Shively v. Semi-Tropic Land & W. Co., 99 Cal. 259, 33 Pac. 848.

10. Davis v. Rawhide Gold Min. Co., 15 Cal. App. 108, 113 Pac. 899 (labor checks).

11. La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42. See supra, § 1, for definition of chose or thing in action.

12. More v. Massini, 32 Cal. 590. See CHAMPERTY AND MAINTENANCE.

13. Phillips v. Carter, 135 Cal. 604, 87 Am. St. Rep. 152, 67 Pac. 1031; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Works v. Merritt, 105 Cal. 467, 38 Pac. 1109. And see Civ. Code, § 1044, which provides that "Property of any kind may be transferred except as otherwise provided by this article."

passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office."[14]

Pursuant to this provision all contracts, with a few exceptions,[15] and actions for breach of contract, are assignable.[16] And things in action arising out of tort to property, real or personal, are assignable, except where they relate to injuries that are purely personal.[17] This distinction is a result of the doctrine of survivorship—that actions for purely personal injuries which die with the

14. Civ. Code, § 954; Burkett v. Doty, 176 Cal. 89, 167 Pac. 518 (affirming 32 Cal. App. 337, 162 Pac. 1042); Estate of Baker, 170 Cal. 578, 150 Pac. 989 (right to contest will); Dibble v. San Joaquin Light & Power Corporation, 31 Cal. App. Dec. 1062, 190 Pac. 198; Flickinger v. Heck, 33 Cal. App. Dec. 71 (in this case the court declared that section 355 of the Code of Civil Procedure, which provides that "if an action is commenced within the time prescribed therefor, and a judgment therein be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal," confers a personal right available alone to the plaintiff or his representatives, and not to the plaintiff's assignee); Straus v. Eaton, 32 Cal. App. Dec. 264, 190 Pac. 1033; Stopp v. Madera Canal & Irr. Co., 34 Cal. App. 41, 166 Pac. 823; Vagnizen v. Savings Union etc. Co., 31 Cal. App. 709, 161 Pac. 507 (quoting from Henderson v. Henshall, 54 Fed. 320); Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252; Watkins v. Glas, 5 Cal. App. 68, 89 Pac. 840; Gibbs v. Tally, 6 Cal. Unrep. 621, 63 Pac. 168 (holding assignable right of action accruing to laborer against owner of building for failure of latter to cause bond to be filed with building contract as required by section 1203 of Code of Civil Procedure. Judgment reversed, 133 Cal. 373, on ground that section 1203, Code of Civil Procedure, was unconstitutional). Henderson v. Henshall, 54 Fed. 320.

15. See supra, § 3; Fratessa v. Roffy, 40 Cal. App. 179, 180 Pac. 830 (a writing, secured by a mortgage, in the form of a promissory note, mentioning the consideration and providing for the cancellation of the note in whole or in part on the happening of a certain contingency, held to be assignable under sections 954 and 1458 of the Civil Code, regardless of whether it was considered a promissory note or a guaranty for the payment of money).

16. La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42; White v. Thompson, 40 Cal. App. 447, 180 Pac. 953 (a cause of action in assumpsit to recover on an existing obligation, which was omitted from negotiations leading to the settlement of an account, and which remained an existing legal obligation, is assignable). And see cases cited infra, §§ 7–10.

17. See infra, § 15.

person cannot be assigned, but choses in action which survive and pass as assets or liabilities to the estate of the deceased may be assigned.[18] And so it is held that assignability of things is now the rule, nonassignability the exception, and this exception is confined to wrongs done to the person, the reputation or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage.[19] The assignee of an assignable chose in action is required under the code to prosecute an action thereon in his own name.[20]

§ 6. Contracts in Restraint of Trade.—It was held to be the rule of the common law that a contract in restraint of trade was not void, as against public policy, when it was limited to a particular place, and is supported by a consideration.[1] Under the California code, a valid contract in restraint of trade may be made between the vendor and vendee of a business but it must be limited to a specified county, city or part thereof, and is to endure only as long as the buyer or any person deriving title to the goodwill from him carries on a like business therein.[2] And an outgoing partner may, upon or in anticipation of a dissolution of the partnership, make a valid contract with his partners not to carry on a similar business within the same city or town where the partnership business has been transacted or within a specified part thereof.[3]

The rule is founded in the conception of the goodwill of a business as property which the law recognizes and protects, and which, like other property, may be sold and

18. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 Pac. 190; Stapp v. Madera Canal & Irr. Co., 34 Cal. App. 41, 166 Pac. 823. See ABATEMENT AND REVIVAL, vol. 1, p. 71 et seq.

19. Simmons v. Zimmerman, 144 Cal. 256, 1 Ann. Cas. 850, 79 Pac. 451; Rued v. Cooper, 109 Cal. 682, 34 Pac. 98. See infra, § 15.

20. See Code Civ. Proc., § 367. See infra, § 43.

1. California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511. See CONTRACTS.

2. Civ. Code, §§ 1673, 1674.

3. Civ. Code, § 1675.

assigned with the business.[4] On the question as to whether upon the sale of a business and goodwill thereof, together with a covenant in restraint of trade running to the purchaser and his assigns, the right to enforce such covenant is limited to the purchaser and his immediate assigns only, and whether it may be enforced by subsequent assignees of the assigns of the purchaser, it was held in an earlier decision of a district court of appeals that the enforcement of such a covenant must be restricted to the immediate assigns of the vendee.[5] But this ruling, based upon a rather technical view of the code, was later reversed, and the rule now is that a covenant in restraint of trade when made in conformity with the statute may be transferred with the business and assigned through successive transfers without limit.[6] And it has been said that the contract and goodwill are valid when held by the assignee of the purchaser, even if no reference is made therein to the successors and assigns of the purchasers.[7]

§ 7. Governmental and Municipal Contracts and Claims.—Contracts for public works are held to be controlled by the same principles which govern the assignability of contracts in general. Hence, where such contracts call for the exercise of special knowledge and skill or involve some special relation of personal confidence, they are not assignable; but where they are let to the lowest bidder, they are usually made without reference to the special ability of the contractor, and are therefore held

4. Civ. Code, § 993; Graca v. Rodrigues, 33 Cal. App. 296, 165 Pac. 1012. See GOODWILL.

5. Johnston v. Blanchard, 16 Cal. App. 321, 116 Pac. 973.

6. Graca v. Rodrigues, 33 Cal. App. 296, 165 Pac. 1012 (opinion adopted by the supreme court in passing upon petition for hearing in this case, and the reasoning and the rule in Johnston v. Blanchard, 16 Cal. App. 321, 116 Pac. 973, disapproved).

7. Graca v. Rodrigues, 33 Cal. App. 296, 165 Pac. 1012; Johnston v. Blanchard, 16 Cal. App. 321, 116 Pac. 973 (citing authority to this point).

assignable.[8] It is a rule that a provision in a contract for public work forbidding its assignment goes only to the performance of the terms of the contract, and does not prevent the assignment of all moneys due or to become due on work which the contractor may perform under the contract as security for money advanced him by the assignee.[9]

§ 8. Contracts for Personal Services.—While contracts are ordinarily regarded as assignable, yet where the language of the contract excludes the idea of performance by another, it is not assignable. And where skill, credit or other personal quality or circumstance of the party is a distinctive characteristic of the thing stipulated for or a material inducement to the contract, it is not assignable.[10] Contracts for personal services, founded on personal qualities, and not assignable without the consent of all the parties, include such as the following: An agreement to render professional services,[11] or services otherwise requiring special skill or capacity;[12] or to deliver all of a commodity the obligor can secure within a specified district;[13] or to act as an exclusive agent to sell certain real estate.[14] And an agreement to sell upon the personal credit of a person named falls within the same rule.[15]

8. Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266; Taylor v. Palmer, 31 Cal. 240; Cochran v. Collins, 29 Cal. 129. See supra, § 3, and infra, § 8.

9. Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154.

10. Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305; La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42; Taylor v. Palmer, 31 Cal. 240; Walton v. Davis, 22 Cal. App. 456, 134 Pac. 795; Sumner v. Nevin, 4 Cal. App. 347, 87 Pac. 1105.

11. Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51 (attorney at law).

12. Fitch v. Brockmon, 3 Cal. 348 (contract to take charge of a stock ranch).

13. Walton v. Davis, 22 Cal. App. 456, 134 Pac. 795.

14. Sumner v. Nevin, 4 Cal. App. 347, 87 Pac. 1105.

15. Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305.

But a contract such as for the improvement of a street, is not made by reason of trust and confidence reposed in the skill and ability of the other contracting party, and, hence, is assignable;[16] and for like reason a contract to do painting and finishing work in a building under construction is assignable.[17] It has been held that a stipulation in an option contract for the purchase of real property making the optionee the exclusive judge of the title, and agreeing to refund a deposit if the title is rejected, is assignable, and that the right to pass upon and reject the title in good faith and to recover the deposit passes to the assignee of the purchaser, in the absence of anything to indicate peculiar trust or confidence reposed by the vendor in the purchaser.[18]

A court cannot direct an assignment of a contract for personal services founded on personal qualities. Neither can it decree that such a contract be held in trust by a servant who had taken such contract in his own name, after a similar contract in favor of his master had terminated, although the employment had not terminated, and the master had requested the servant to renew the contract for the master's benefit.[19] Nor can an action upon a nonassignable contract for personal services be maintained by an undisclosed principal.[20] But an assignment may be made of a debt substantially due for services already rendered under the contract,[1] or of a cause of action for its breach.[2]

§ 9. **Wages and Salaries.**—Future wages to be earned under an existing contract of employment were consid-

16. Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266; Taylor v. Palmer, 31 Cal. 240.

17. Gribling v. Bohan, 26 Cal. App. 771, 148 Pac. 530.

18. Simmons v. Zimmerman, 144 Cal. 256, 1 Ann. Cas. 850, 79 Pac. 451. See VENDOR AND PURCHASER.

19. Sumner v. Nevin, 4 Cal. App. 347, 87 Pac. 1105.

20. Walton v. Davis, 22 Cal. App. 456, 134 Pac. 795.

1. Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51.

2. Walton v. Davis, 22 Cal. App. 456, 134 Pac. 795.

ered by the common law as having a potential existence sufficient to make valid a present assignment thereof.[3] As respects the legal sufficiency of such assignments, all future wages to be earned under an existing employment may be assigned for a valuable consideration or as security for subsisting indebtedness, without regard to the terms of such existing employment; but no past assignment is legally sufficient to carry the wages to be earned in a distinct future employment by a different employer, and no action at law will lie to enforce the same. And such an assignment of future wages to be earned in a distinct future employment is not operative at law though expressed as an irrevocable power of attorney. However, a contract to assign future wages to be earned under a future employment is not against public policy, and may become operative in equity when the subject matter of such wages becomes existent, and an assignment thereof contracted for has been made.[4]

Limitation of rule.—It is provided by the Civil Code that an assignment of wages must be in writing by the assignor, and if the assignor is married, the other spouse must join in the assignment; and if the assignor is a minor the consent of his parent or guardian must be attached to the assignment; and assignments of future earnings are expressly forbidden except where the assignment is for the necessities of life and then only to the person or persons furnishing such necessities of life directly and then only for the amount needed to furnish such necessities. Irrevocable powers of attorney to assign or collect wages or salary are also rendered invalid.[5] But the operation of this section is not retroactive, and hence an assignment

3. Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 553, 102 Pac. 956.

4. Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956. See infra, § 11, as to contingencies and possibilities.

5. Civ. Code, § 955 (Stats. 1913, p. 537). The provisions of this section do not affect the restrictions placed upon the matter of making of assignments of public officers' salaries. Trow v. Moody, 27 Cal. App. 403, 150 Pac. 77. See infra, § 10.

by a husband for services performed before its enactment did not require the written consent of the wife.[6]

§ 10. Salaries and Fees of Public Officers.—The rule is well established that the assignment of his salary by a public officer before it becomes due is contrary to public policy, as impairing the efficiency of the public service, and is therefore void both in law and equity.[7] And the rule has been extended so far as to prohibit such assignments being made of fractional parts of a monthly salary after they become due.[8]

It is conceded, however, that if the officer should resign or be dismissed before the end of the period for which employed, his salary to the time of his resignation or dismissal may be assigned.[9] And after the salary of a public official is earned, there is no objection to its assignment.[10]

Contingent Interests.

§ 11. Contingencies and Possibilities Generally.—The code provides that "a mere possibility, not coupled with an interest, cannot be transferred."[11] The code provi-

6. Thomas v. Fursman, 39 Cal. App. 278, 178 Pac. 870

7. Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963 (deputy and copyists of county clerk); Trow v. Moody, 27 Cal. App. 403, 150 Pac. 77 (deputy treasurer); Wilkes v. Sievers, 8 Cal. App. 659, 97 Pac. 677 (police clerk). Sections 1044 and 1045 of the Civil Code do not tend in any manner to diminish the force of this rule. Trow v. Moody, 27 Cal. App. 403, 150 Pac. 77.

8. Trow v. Moody, 27 Cal. App. 403, 150 Pac. 77.

9. Wilkes v. Sievers, 8 Cal. App. 659, 97 Pac. 677.

10. National Bank of D. O. Mills & Co. v. Herold, 74 Cal. 603, 5 Am. St. Rep. 476, 16 Pac. 507.

11. Civ. Code, § 1045; Victoria Hospital Assn. v. All Persons, 169 Cal. 455, 147 Pac. 124. (Assuming the existence in this state of the rule that the real estate of a charitable corporation reverts or escheats to the donor upon its dissolution, the donor, during the existence of the corporation and while it owns the land, is without any legal interest therein. He has at most only a mere possibility, not coupled with an interest. Whatever legal interest in the property he may ever have, on this account, will be created only

sion (with section 700 of the same code)[12] states the established rule of the common law; and it does not change the long and well-established doctrines of equity relative to the assignment of future contingent interests and expectancies.[13] Under the common law an assignment of a right or interest could not be operative, unless the thing transferred had either an actual or potential existence.[14] But equity followed a different rule and upheld assignments of contingent interests and expectations, and things, although they have no present actual or potential existence but rest in mere possibility only.[15] And this is the rule under the code provisions and the decisions.[16]

by the dissolution of the corporation at a time when it still owns the land); Chandler v. Hart, 161 Cal. 405, 119 Pac. 516 (the estate of a lessee is not a mere possibility not coupled with an interest which is not transferable, but is a present subsisting estate for years which may be transferred, under section 1044 of the Civil Code the same as any other species of property, where there is no condition or covenant in the lease forbidding its assignment or a sublease of a part thereof); Newlove v. Mercantile Trust Co., 156 Cal. 657, 105 Pac. 971 (holding that heir had vested estate subject to divestiture or termination on happening of subsequent event, and not "a mere possibility not coupled with an interest"); Estate of Ryder, 141 Cal. 366, 74 Pac. 993; Estate of Wickersham, 138 Cal. 355, 70 Pac. 1076; Estate of Garcelon, 104 Cal. 570, 38 Pac. 414.

A power coupled with an interest must be an interest in the thing itself, and must be grafted on an estate in the thing; and the power and interest must be united in the same person. Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956 (applying this rule to an assignment of wages. See supra, § 9, as to wages, etc.). And see infra, § 22.

12. Civ. Code, § 700, reads as follows: "A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind." See infra, § 12, as to expectancy of an heir apparent.

13. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149; In re Garcelon's Estate, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414; Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956.

14. Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52; Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956.

15. See cases cited supra.

16. See Civ. Code, § 1045 (quoted supra), as to "a mere possibility not coupled with an interest" being alone excluded from the operation of the rule.

The following cases illustrate things regarded as having a poten-

Effect is given in equity to such assignments, not as a present positive transfer, operative in praesenti, for that can be done only of a thing in esse, but as a present contract to take effect and attach as soon as that thing to which the assignment refers has ripened into reality, without the necessity of another act.[17] By such an assignment there is created a present equitable charge on the property, which equity recognizes as vested, although it is neither vested nor valid at law, and which, when the property or right becomes existent, at once ripens into lien or preferred right thereon.[18] Equity will not, however, uphold such assignments of future and contingent interests and expectations, unless they are fairly made and are supported by a valuable consideration and do not

tial existence sufficient to make them capable of assignment: Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52 (future crops of fruit from trees then in existence); La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42 (fruit to be raised during a certain period); Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718 (crop not yet planted on land of mortgagor); Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956 (future wages to be earned under a subsisting contract of employment). And see cases cited supra, §§ 9, 10. See, also, CROPS.

17. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149 (sale of heir's expectancy); Bibend v. Liverpool & L. Fire & L. Ins. Co., 30 Cal. 78 (insurance policy, assigned as security for loan to one having no interest in policy); Pierce v. Robinson, 13 Cal. 116; Johnston v. Blanchard, 16 Cal. App. 321, 116 Pac. 973; Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956 (assignment of wages not under present contract of employment).

18. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149 (holding that an assignment invalid at law but good in equity is valid in equity against the assignor in bankruptcy to the extent of the equitable charge or lien created thereby, and that the personal obligation to pay—which alone is affected by the bankruptcy proceedings—is unnecessary to the enforcement of such charge or lien); Bibend v. Liverpool etc. Ins. Co., 30 Cal. 78; Pierce v. Robinson, 13 Cal. 116 (holding that an equitable assignment of surplus rents and profits to accrue are so held in trust, but that the proceeds as trust property do not pass to the administrator as general assets for the benefit of the creditors at large, but are subject in his hands to the same trust which attached to them before the decease of the intestate).

contravene any recognized rule of public policy.[19] But the existence of inequitable or unconscionable features will not prevent the enforcement of an assignment so far as it is just and reasonable.[20]

"Debt" not in existence.—Under the rule that the word "debt" as used in the law of garnishment includes only legal debts, and not mere equity claims,[1] it has been held that an assignment of a debt not in existence is not valid at law, since such an assignment creates an equity only.[2]

§ 12. Expectancies of Heirs.—The code provisions[3] to the effect that the expectancy of an heir apparent is a mere possibility that cannot constitute an interest of any kind and that it cannot be transferred are held merely to declare the pre-existing rules of law on the subject but not to change the rules of equity thereon.[4]

19. See the following cases stating the rule but upholding the particular assignments involved: Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149; In re Garcelon's Estate, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414; Bibend v. Liverpool etc. Ins. Co., 30 Cal. 78; Pierce v. Robinson, 13 Cal. 116.

20. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149.

1. Redondo Beach Co. v. Brewer, 101 Cal. 322, 35 Pac. 896 (holding that where the vendor of an executory contract for the sale of real property elects to declare it forfeited because of the failure of the assignee of the vendee to pay according to its terms, the right of the assignee for money paid on the contract or for improvements made upon the property is merely an equity and not subject to garnishment); Hassie v. God Is With Us Congregation, 35 Cal. 378. See ATTACHMENT; GARNISHMENT.

2. Hassie v. God Is With Us Congregation, 35 Cal. 378.

3. Civ. Code, § 700 (see supra, § 5).

Civ. Code, § 703, reads: "No future interest in property is recognized by the law, except such as is defined in this division of the code."

And Civ. Code, § 1045, reads: "A mere possibility, not coupled with an interest, cannot be transferred."

4. This construction of these sections is in harmony with section 5 of the Civil Code, and also follows the presumption that the legislature, in the enactment of statutes, does not intend to overturn long-established principles of law unless such intention is made to clearly appear either by express declaration or by necessary implication. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149. In re

The effect of an assignment of an expectancy by an heir is to create a present equitable charge upon the property which equity recognizes as vested, although it is neither vested nor valid at law, and which, when the descent is cast, ripens at once into a lien upon the property.[5] In accordance with the maxim that "he who seeks equity must do equity," inequitable or unconscionable terms of such assignments will not be enforced; they will be enforced only to the extent that they are fair and reasonable,[6] and based upon a valuable consideration.[7] It is not necessary to the enforcement in equity of an assignment by an heir of his expectancy that it was consented to or approved by the ancestor, or that it be made to someone who already had some interest in the property.[8]

Covenant not to contest a will.—Although a mere possibility is not the subject of release at common law, and a covenant not to sue in respect to matters arising out of future contracts is too uncertain to be valid, yet where

Garcelon's Estate, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414. See STATUTES.

While an expectancy is not usually regarded as property, the moment the ancestor has died, that expectancy has changed into a vested interest in property. It becomes thus vested by virtue of the death. If, then, those rights are destroyed or impaired by an instrument which, though in form a will, is not for any reason recognized by the law as a valid instrument, the heir is stripped of his vested rights to property by a paper writing as iniquitous in its effect as though it were forged. The contest of a will therefore goes to establish upon the part of the contestant that his right to the property has been violated, and such a right is one that survives or may be transferred under section 954 of the Civil Code. Estate of Baker, 170 Cal. 578, 150 Pac. 989.

5. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149 (holding that an assignee is not divested of the lien by the discharge in bankruptcy of the assignor).

6. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149.

7. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149; Estate of Wickersham, 153 Cal. 603, 96 Pac. 311 (holding that an averment of adequacy is a legal conclusion and that, without setting forth the facts, such an averment would not be sufficient).

8. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149.

the subject matter of an existing covenant not to contest a will is in the mind of the contracting parties, and the covenant operates as a release of an expectancy as heir, upon the same principle upon which courts of equity uphold assignments of such expectancies, they will sustain such covenant as a release by the heir apparent of his contingent right to contest the will of his ancestor, and enforce the same when fairly obtained, and for an adequate consideration.[9] The execution of a conveyance of a prospective interest in the estate of an ancestor, and an agreement not to contest any disposition thereof made by the will of such ancestor, is not against public policy but is valid if made on an adequate consideration.[10]

Choses in Action Relating to Realty.

§ 13. Land Warrants and Certificates of Purchase.— Under the rule that the policy of the law is to encourage transfers and alienations of property,[11] it has been held that it is not necessary that a patent or certificate issued by the government land office, in order to be assignable, expressly provide for its assignment, since the right to assign the same exists if it is not expressly prohibited or opposed to public policy.[12] So, certificates for the purchase of state school lands are assignable in the absence

9. In re Garcelon's Estate, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414 (holding that the heir is thereby estopped from asserting any future claim as heir to the estate of the ancestor). Estate of Ryder, 141 Cal. 366, 74 Pac. 993. (In this case the court declared: "While such a contract by an heir-apparent may in some cases be enforced in equity as an agreement to convey or by way of estoppel, it is not a conveyance of the legal title, and is not within the letter and spirit of section 1678 of the Code of Civil Procedure"); Estate of Wickersham, 138 Cal. 355, 70 Pac. 1076. See WILLS.

10. Estate of Wickersham, 153 Cal. 603, 96 Pac. 311; In re Garcelon's Estate, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414 (the leading case).

11. See supra, § 5.

12. Phillips v. Carter, 135 Cal. 604, 87 Am. St. Rep. 152, 67 Pac. 1031 (entry under Desert Land Act of 1877).

of any stipulation or statute to the contrary.[13] And, subject to like condition, certificates of purchase at sheriff's and judicial sales may be assigned.[14] It has been held that an assignment of a certificate of purchase of land, issued by the state, by way of security for a debt due by the assignor to the assignee, operates as an equitable mortgage on the interest in the land which the assignor may have acquired by virtue of the certificate.[15] The assignee does not take the legal title, but acquires merely an equitable interest. He is not regarded as entitled to the protection of a bona fide purchaser, and is subject to all defenses that may be urged against his assignor. Hence it is a rule that the assignee of a judgment and of a sheriff's certificate of sale under it stands in the same position as his assignor in the event that the judgment is subsequently reversed and the sale set aside.[16]

§ 14. Options—Servitudes.—An option for the purchase or sale of land may be assigned where it does not appear that it was given because of a particular trust or confidence reposed in the purchaser alone.[17] Thus, where it appeared that the vendor relied upon a mortgage of the land as security for the repayment of a part of the purchase price rather than upon the credit of the optionee, it was held that an option for the sale and purchase of real property may be assigned although it provided for the payment of a part of the consideration in

13. Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156.

14. Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

15. Hill v. Eldred, 49 Cal. 398.

16. Reyolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459. See infra, § 37, as to rule that equities are available against assignee.

17. Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305; Blakeman v. Miller, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587; La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42; Simmons v. Zimmerman, 144 Cal. 256, 1 Ann. Cas. 850, 79 Pac. 451 (holding that a stipulation in an option contract making the optionee purchaser the exclusive judge of the title and agreeing to refund a deposit if the title is rejected, does not show such trust or confidence in the optionee by the vendor as to make the option nonassignable).

the promissory notes of the vendee secured by a mortgage on the property.[18] And an option to purchase, incorporated in a lease, is regarded as running to the assigns of the lessee, in the absence of a stipulation to the contrary in the lease.[19]

Servitudes.—At the common law, servitudes merely in gross were not assignable, though the doctrine was looked upon with disfavor by the courts and many nice distinctions were invented to limit it.[20] But the code has swept away both the rule and the distinctions, and has declared this class of servitudes to be property,[1] and has also stated that every species of property, except a mere possibility not coupled with any interest, may be transferred.[2] While it was held in an earlier case that the servitudes named in section 802 of the Civil Code are not assignable,[3] later it was held that this former holding was merely dictum, and the rule is now that servitudes in gross are assignable.[4]

Choses in Action for Torts.

§ 15. In General.—The rule governing the assignability of causes of action arising out of torts is set forth in the Civil Code as follows:

"A thing in action arising out of the violation of a right of property or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office."[5]

18. Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305.

19. Blakeman v. Miller, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024 (right of way).

20. Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

1. Civ. Code, § 802.

2. Civ. Code, § 1044; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Rice v. Whitmore, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501. See supra, § 3.

3. Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539.

4. Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

5. Civ. Code, § 954. See infra,

In construing this provision of the code it has been said that it effected a change in the common-law rule of the nonassignability of choses in action, and that it includes and renders assignable not only claims arising from torts directly to real or personal property, but also those flowing out of frauds, deceits and other wrongs by which real or personal property is injured, diminished or damaged. And the general rule now appears to be that a claim for damages to real property may be assigned without assigning or transferring with the claim any interest in the property damaged.[6] However, the strict rule of the early common law, that a cause of action arising out of a tort is nonassignable, has never prevailed in California.[7] And so it was held previous to the adoption of the Civil Code, that a claim for damages was assignable whether suffered either upon real property,[8] or upon personal property.[9]

§ 37, as to assignment of thing in action not to prejudice defense; and see Code Civ. Proc., §§ 1582, 1583, as to certain actions maintainable by executors and administrators.

6. Stapp v. Madera Canal & Irr. Co., 34 Cal. App. 41, 166 Pac. 823. (And see the authorities cited in this case from Montana, New York, Oregon, Virginia, and Washington, where, in the states named, the particular code section construed is exactly the same as California Civ. Code, § 954.) And see Henderson v. Henshall, 54 Fed. 320 (holding that a cause of action for damages for fraudulent representations as to the value of land which induced an exchange is "a thing in action arising out of the violation of a right of property," within the meaning of section 954 of the Civil Code).

See distinction infra, this section, as between claims arising out of damage to property and those arising out of personal injuries.

7. Rued v. Cooper, 109 Cal. 682, 34 Pac. 98; More v. Massini, 32 Cal. 590; Oliver v. Walsh, 6 Cal. 456.

8. More v. Massini, 32 Cal. 590 (in this case the court said: "There can be no tenable distinction between trespasses affecting personal and trespasses affecting real estate. Both are torts—the wrong is to property in both cases—the right of action survives in both, and under our system, the argument drawn from the doctrine of champerty, which constitutes the very basis of the nonassignability of choses in action, at common law, has no application to an assignment of a claim falling under either class. Cessante ratione cess at lex.")

9. Lazard v. Wheeler, 22 Cal. 139 (conversion of personal property).

See note, 5 A. L. R. 130, as to assignability of right of action ex de-

Claims for personal injuries.—A distinction is drawn between claims arising out of damage to property and those arising out of personal injuries or damage to the person,[10] and it is held that the criterion by which the assignability of things in action may be determined is whether the claim or demand survives upon the decease of the party or dies with him. If the claim survives upon the death of the party, it is assignable under the general rule, but if it dies with him, it is not assignable.[11]

Pursuant to this rule it is held that claims arising out of wrongs or injuries committed upon the body or feelings of the injured person, such as assault, battery, slander,[12] deceit or misrepresentation,[13] malicious prosecu-

licto for injury to property as affected by statute.

10. Stapp v. Madera Canal & Irr. Co., 34 Cal. App. 41, 166 Pac. 823 (holding that the term "obligation" as used in section 954 of the Civil Code (see supra), is used as synonymous with contract and does not include any claim for damage sustained through a tort).

11. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 Pac. 190; Rued v. Cooper, 109 Cal. 682, 34 Pac. 98; More v. Massini, 32 Cal. 590; Jones v. Manning, 35 Cal. App. 321, 169 Pac. 912; Stapp v. Madera Canal & Irr. Co., 34 Cal. App. 41, 166 Pac. 823. (The court here says: "If all things in action are separated into two classes by this division, say the cases cited in Kerr's Civil Code under section 954, 'those embraced in the first class are assignable and those which fall in the second class are not. In the first class may be put claims arising from a breach of contract; those arising from torts directly to real or personal property; and frauds, deceits and other wrongs by which estate real or personal is injured, diminished or damaged. In the second class are all torts to person or character, when injury and damage are confined to the body or feelings of the person injured.'") And see Lawrence v. Martin, 22 Cal. 173 (holding that an assignment of a mere personal tort is a nullity because there is no assignable subject upon which it could operate). As to survivability, see ABATEMENT AND REVIVAL, vol. 1, p. 71 et seq.

12. See Rued v. Cooper, 109 Cal. 682, 34 Pac. 98; Stapp v. Madera Canal etc. Co., 34 Cal. App. 41, 166 Pac. 823. And generally, ASSAULT AND BATTERY; LIBEL AND SLANDER.

13. Archer v. Freeman, 124 Cal. 528, 57 Pac. 474; Lawrence v. Montgomery, 37 Cal. 183. See infra, § 16, as to mere naked right to file bill in equity for fraud not assignable; and see, generally, FRAUD AND DECEIT.

tion,[14] false imprisonment,[15] and the like, and contracts of a purely personal nature like promises of marriage, die with person and cannot be assigned.[16] So claims of public officers for fatigue and loss of time due to overwork have been held to be of a strictly personal nature and not subject to assignment.[17]

The character of a claim for personal injury is not changed by verdict to a debt which can be assigned before judgment, but after judgment is entered upon the verdict it becomes a debt, and hence assignable.[18] But a husband may relinquish to a wife, as a part of the community, his interest in a cause of action for personal injury sustained by her.[19] And a surviving partner may prosecute an action for injury to the partnership arising out of a nonassignable tort.[20]

§ 16. Mere Right to Bring Bill in Equity.—The rule is well settled that a mere naked right to file a bill in equity for fraud committed upon the assignor is not assignable. Such an assignment is held void as contrary to public policy.[1] Hence it has been held that a mere right to file a bill in equity to set aside a judgment on the ground that it was obtained by fraud is not assignable.[2] And

14. Lawrence v. Martin, 22 Cal. 173. See MALICIOUS PROSECUTION.

15. Harker v. Clark, 57 Cal. 245. See FALSE IMPRISONMENT.

16. See BREACH OF PROMISE OF MARRIAGE.

17. Jones v. Manning, 35 Cal. App. 321, 169 Pac. 912.

18. Lawrence v. Martin, 22 Cal. 173.

19. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 Pac. 190.

20. Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112 (malicious attachment).

1. Greenlee v. Los Angeles Trust etc. Bank, 171 Cal. 371, 153 Pac. 383 (stating the rule but holding that fraud was not set up in this case); Smith v. Pacific Bank, 137 Cal. 363, 70 Pac. 184; Archer v. Freeman, 124 Cal. 528, 57 Pac. 474; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; Whitney v. Kelley, 94 Cal. 146, 28 Am. St. Rep. 106, 15 L. R. A. 813, 29 Pac. 624; Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94. And cases cited infra.

2. Whitney v. Kelley, 94 Cal. 146, 28 Am. St. Rep. 106, 15 L. R. A.

an assignment of a right to impeach, on the ground of fraud and mistake, an account stated and settled, passes no property or right of property and is void as against public policy.[3] So a decree for specific performance of a contract to transfer certain personal property (railroad bonds) will not be granted against a defendant who is shown to be only the owner of a personal right of action to avoid title to the bonds upon the ground of fraud.[4]

Exception to rule.—The general rule that a mere right to complain of fraud is not assignable applies only to a case where the assignment carries nothing independent of the right to sue for fraud. It does not apply to a case where the right to sue for a fraud is merely incidental to a subsisting property right which has been assigned, and which is intrinsically susceptible of legal enforcement.[5] Hence, it has been held that an assignee of money claims against an estate which have been allowed by the executrix may bring an action to set aside a voluntary conveyance by the decedent to the executrix, made, in his lifetime, for the purpose of hindering and defrauding creditors.[6]

813, 29 Pac. 624 (judgment awarding real property adversely to assignor); Sanborn v. Dee, 92 Cal. 152, 27 Am. St. Rep. 101, 28 Pac. 105 (decree of discharge in insolvency).

3. Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94.

4. Smith v. Pacific Bank, 137 Cal. 363, 70 Pac. 184.

5. Greenlee v. Los Angeles Trust etc. Bank, 171 Cal. 371, 153 Pac. 383; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; McCord v. Martin, 34 Cal. App. 129, 166 Pac. 1014 (decided on theory that action was for recovery of money had and received by defendants for use and benefit of plaintiff's assignors); White v. Thompson, 40 Cal. App. 447, 180 Pac. 953; Conlin v. Emanuel Lewis Inv. Co., 26 Cal. App. 388, 147 Pac. 472 (holding that an action for damages incurred in moving a house and improvements from one lot to another, and based on the ground of fraud and misrepresentation of the owner in pointing out the wrong lot to the purchaser, may be maintained against such purchaser, where it appears from the evidence that the vendor must be regarded as having made the same misrepresentations to the plaintiff).

6. Emmons v. Barton, 109 Cal. 662, 42 Pac. 303.

It is essential that a party complaining in equity should have some present substantial interest in the subject matter of the suit. But an assignment of a naked right to complain of fraud transfers no equitable interest, and consequently an assignee thereof has no right upon which he can proceed in a court of equity. And the payee of a chose in action cannot be heard to complain of fraud in the assignment by himself of an interest therein to a third person after he had parted with all interest in the thing in action and in the security to the maker thereof.[7]

III. EQUITABLE ASSIGNMENTS.

§ 17. In General.—As stated in a preceding section, it has long been the rule in equity to support assignments of contingent interests, expectancies and mere possibilities, provided they are fairly made and are not opposed to any rule of public policy.[8] But it would seem that even in equity, to give validity to the assignment of a fund or money due under a contract it is essential that the fund assigned have either an actual or potential existence, and that in the case of a contract it should actually exist at the time,[9] and that the assignee proceed upon some equitable right or interest,[10] and that the assignment be supported by a valuable consideration.[11]

Equity has been accustomed to enforce and protect assignments of choses in action which are not cognizable at law.[12] Thus, where there is an intention to transfer title to a chose in action, and the assignor has received a valuable consideration from the assignee, but a valid assignment is not effected at law, equity will carry out their

7. Greenlee v. Los Angeles Trust etc. Bank, 171 Cal. 371, 153 Pac. 383.

8. See supra, § 11.

9. Smitton v. McCullough (Cal.), 189 Pac. 686.

10. See supra, § 16.

11. See infra, §§ 19, 24.

12. See cases cited infra, this section, and infra, § 19.

intention and protect the rights of the assignee. This rule has been applied in cases where there has been a direction of a creditor to a debtor to pay a debt to another,[13] or an unaccepted order upon the whole of a fund,[14] or upon a portion of a fund.[15]

An equitable assignment may be created by the voluntary acceptance of the benefits of a contract;[16] but an intent of the assignee to perform under the terms of the contract must be shown.[17]

§ 18. Implied by Operation of Law.—Under certain circumstances an equitable assignment of a chose in action may be implied. Thus, an equitable assignment to a bank will be implied of a note made payable to a cashier and presumably for the use of the bank upon his ceasing to be connected with the institution.[18] Another form of an implied equitable assignment is the transfer of a chose in action through the application of the equitable doctrine of subrogation. Thus, a surety upon a promissory note upon being compelled to pay the same becomes the equitable assignee of the note, and entitled to enforce its payment according to its tenor and effect as the holder thereof,

13. Curtner v. Lyndon, 128 Cal. 85, 60 Pac. 462; Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149 (husband directed purchaser of lands to pay proceeds to his wife); Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247.

14. Brady v. Ranch Min. Co., 7 Cal. App. 182, 94 Pac. 85. See infra, § 29.

15. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462. See infra, § 29. See supra, § 3, as to assignment of negotiable instruments. And see infra, § 18, for examples of equitable assignments implied by operation of law. For a discussion of check as operating as equitable assignment of bank deposit, see BANKS.

16. Civ. Code, § 1589. See Boyd v. Big Three Ranch Co., 24 Cal. App. 108, 140 Pac. 298 (declaring that the rule of section 1589 of the Civil Code has application only where the statute does not specify the character of the contract requisite to liability, and that the section evidently refers to contracts not required by statute to be in writing).

17. California Packing Corp. v. Emirzian (Cal. App.), 187 Pac. 77; Canale v. Cojsello, 137 Cal. 22, 69 Pac. 698.

18. Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705.

and also to foreclose a mortgage given to secure him from liability on the note.[19] And an assignment by a ward of a judgment against the guardian upon the settlement of his accounts operates as an equitable assignment of the ward's cause of action against the sureties on his bond, and entitles the assignee to maintain an action on such bond against the sureties.[20] It has been held, though, that the delivery of money to a bank by an owner of a building under construction with power to pay the building contractor upon the production of releases of liens does not create an equitable assignment in favor of the lien claimants.[1]

§ 19. Form and Requisites.—It is well settled that no particular form or mode of transfer is essential to the creation of an equitable assignment. If from the entire transaction it clearly appears that it was the intention of the parties to transfer title to the chose in action, then an assignment will be held to have been effected.[2] Thus, where an obligation in writing was assigned with intent to transfer the indebtedness it represented, it was held there was an equitable assignment of the indebtedness though the obligation was invalid.[3]

A valuable consideration, however, is necessary to the creation of an equitable assignment. A mere intention to make an assignment as a gift is insufficient to transfer

19. Waldrip v. Black, 74 Cal. 409, 16 Pac. 226. See SURETYSHIP.

20. Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180.

1. Wade v. City & County Bank, 25 Cal. App. 675, 145 Pac. 145.

2. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69; Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94; Wiggins v. McDonald, 18 Cal. 126; Pope v. Huth, 14 Cal. 403; Pierce v. Robinson, 13 Cal. 116; Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149; Title Ins. & T. Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247; Estate of Heeney, 3 Cal. App. 548, 86 Pac. 842 (where parties by payment of debt became equitable assignees of a mortgage lien and claim therefor). See infra, §§ 31, 32, as to rights conveyed by assignments.

3. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Wetmore v. City and County of San Francisco, 44 Cal. 294.

any interest either in equity or law.[4] And there must be an equitable interest, either present or future, upon which an equitable assignment may be operative.[5] But, in general, it is not essential to the validity of an equitable assignment that the consent of the debtor be obtained.[6]

An equitable assignment of a specific demand or particular indebtedness may be effected by means of an instrument having the form of an order or bill of exchange drawn by the creditor upon the debtor for either the full amount,[7] or for a portion thereof.[8] And it is not essential that the intention to make such assignment should appear upon the face of the order or bill of exchange, for an equitable assignment may be made orally as well as in writing,[9] unless it would be contrary to a positive statutory enactment.[10]

IV. FORMAL REQUISITES AND VALIDITY.

In General.

§ 20. Parol Assignments—Written Assignments.—The code specifically provides that "a transfer may be made without writing, in every case in which a writing is not expressly required by statute."[11] Subject to the positive

4. Fidelity Savings & Loan Assn. v. Rodgers, 180 Cal. 683, 182 Pac. 426; Estate of Webb, 49 Cal. 541. And see infra, § 24. See GIFTS.

5. See supra, § 17.

6. See infra, § 27.

7. See infra, § 30.

8. See infra, § 29.

9. Oswald v. Schwartz, 181 Cal. 620, 185 Pac. 959 (rule applied to oral assignment of bonds to be received by the assignor in the future); Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149 (oral assignment of money due for sale of real estate held valid). See infra, § 20, as to assignment by parol.

10. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518. See Civ. Code, § 1091 (requiring transfer of interest in real property exceeding one year to be in writing). And see supra, § 9, as to requirement of statute that assignment of future wages be in writing.

11. Civ. Code, § 1052. See infra, this section, as to exceptions under the statute; i. e., statutory provisions requiring certain assignments to be in writing.

enactments of statute requiring certain assignments to be in writing,[12] it is ordinarily immaterial, therefore, whether an assignment is made orally or in writing.[13] And the rule is equally applicable to both legal and equitable assignments.[14]

Accordingly, assignments have been held to be valid and binding upon the debtor when notified thereof, or accepted by him, in the following instances: An oral assignment of bonds to be received by a subcontractor as security for the repayment of money advanced to the subcontractor,[15] or of a judgment,[16] or of a cause of action to recover the amount of a deposit in a bank,[17] or of a negotiable promissory note accompanied by delivery thereof,[18] or of personal property to be held in trust,[19] or of money due on the sale of real estate,[20] or of an indebtedness due the lessee of a newspaper route.[21]

One to whom an assignment is delivered in blank is authorized to fill in the name of the assignee.[22]

Exceptions to rule.—It is a rule under the code that:

"A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."[1]

12. See supra, §§ 9, 19.

13. See cases cited infra. "It is only in particular instances, as in claims for wages or salary, that the assignment must be in writing"; Straus v. Eaton, 32 Cal. App. Dec. 264, 190 Pac. 1033.

14. Smitton v. McCullough (Cal.), 189 Pac. 686; Oswald v. Schwartz, 181 Cal. 620, 185 Pac. 595. See supra, § 17 et seq., as to equitable assignments.

15. Oswald v. Schwartz, 181 Cal. 620, 185 Pac. 959.

16. Smith v. Peck, 128 Cal. 527, 61 Pac. 77.

17. Dingley v. McDonald, 124 Cal. 90, 56 Pac. 790.

18. Edwards v. Wagner, 121 Cal. 376, 53 Pac. 821.

19. Doran v. Doran, 99 Cal. 311, 33 Pac. 929; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659.

20. Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149.

21. Straus v. Eaton, 32 Cal. App. Dec. 264, 190 Pac. 1033.

22. Thomas v. Fursman, 39 Cal. App. 278, 178 Pac. 870; De Moulin, v. Magnesite Ref. Co., 32 Cal. App. Dec. 1043.

1. Civ. Code, § 1147.

But if the assignment is by a writing transferring title to the chose in action to the assignee, it is not essential to the validity of the gift that the possession of the thing given be passed to the donee.[2] In the case of a chose in action not evidenced by a written instrument, the only means of obtaining control that is recognized by the authorities is an assignment in writing, or some equivalent thereof,[2a] and this must be delivered to consummate the transfer.[2b] By the express provisions of the code it is also a rule that certain assignments of salary or wages must be in writing.[3] And it is also provided by statute that the transfer of an interest in real property exceeding one year is invalid unless it is in writing.[4]

Parol authority to fill in name of assignee.—An assignment is not invalid because at the time of its execution the name of the assignee is omitted therefrom, where a valuable consideration was paid, and it was the intention of the assignor to convey his interest in the claim. It may be filled in pursuant to parol authority, and an assignor who signs an assignment containing blanks, must intend it to be filled in by the person to whom it is delivered.[5]

§ 21. Delivery of Instrument of Assignment—Thing Assigned.—The Civil Code provides that a grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor;[6] and an assign-

2. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042 (rule applied to written assignment of note and mortgage retained by assignor). See for a full treatment of this subject, article GIFTS.

2a. Adams v. Merced Stone Co., 176 Cal. 415, 178 Pac. 498.

2b. DeMoulin v. Magnesite Ref. Co., 32 Cal. App. Dec. 1043 (citing § 1043, Civ. Code).

3. Civ. Code, § 955. See supra, § 9.

4. See Civ. Code, § 1091. See PROPERTY; STATUTE OF FRAUDS.

5. Thomas v. Fursman, 39 Cal. App. 278, 178 Pac. 870 (reversed on other grounds). See as to filling blanks generally, ALTERATION OF INSTRUMENTS, vol. 1, p. 1083 et seq.

6. Civ. Code, § 1054.

ment is a "grant" within the meaning of that term as used in the code.[7] Hence, the mere signing of an instrument of assignment of a chose in action does not transfer any interest. It must be delivered with the intent that it shall be operative as a transfer.[8] And such an intent will be inferred from the acknowledgment of an assignment followed by the transfer of the possession thereof to the assignee without explanatory or qualifying words to indicate any other intent.[9] An assignment cannot be delivered conditionally. Consequently, delivery thereof to the assignee or his agent is necessarily absolute, and the instrument takes effect thereupon, discharged of any conditions on which the delivery was made.[10] And an assignment may be accomplished merely by the manual delivery of the written evidence of a chose in action with intent to transfer title thereto to the assignee.[11] The production of an assignment by the plaintiff's attorney raises a presumption of delivery that is sufficient in the absence of evidence to the contrary.[11a]

Change of possession of thing assigned.—Things in action are expressly exempt under the code from the statutory rule requiring a valid transfer of personal property to be followed by immediate delivery and change of possession, in order to render such transfer valid as to creditors.[12] So, where an assignment is absolute in its terms

7. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

8. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518, affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Ritter v. Stevenson, 7 Cal. 388.

9. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042. See ACKNOWLEDGMENT, vol. 1, p. 231.

10. See Civ. Code, § 1056; Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156 (assignment of certificate of purchase of state school lands).

11. Lucas v. Pico, 55 Cal. 126 (promissory note indorsed in blank); Bibend v. Liverpool & L. Fire & Life Ins. Co., 30 Cal. 78 (policy of life insurance). See supra, §§ 17, 18, as to equitable assignments.

11a. Thomas v. Fursman, 39 Cal. App. 278, 178 Pac. 870.

12. See Civ. Code, § 3440.

is not essential to the validity of an assignment of a chose in action.[8] Thus, a chose in action may be transferred as a gift, but the transaction must be executed.[9] And where the legal title to a chose in action is in the assignee, he may recover thereon, though the beneficial interest is still in the assignor.[10] But assignments of choses in action are subject to section 3442 of the Civil Code. Hence an assignment made as a gift would not be valid if made during insolvency or in contemplation of insolvency.[11] And where an assignment is incomplete, no right is acquired by the assignee, since neither the law nor equity will aid a volunteer to perfect an unexecuted gift.[12]

Consideration for equitable assignment.—It is well settled that a consideration is absolutely essential to the validity of an equitable assignment.[13] Thus, an order or writing for the payment of money or delivery of property which does not by its legal effect constitute an equitable

8. Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962. Section 1040 of the Civil Code provides as follows: "A voluntary transfer is an executed contract, subject to all the rules of law concerning contracts in general; except that a consideration is not necessary to its validity."

9. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042 (holding valid a gift made by delivery of written assignment of note and mortgage though note and mortgage were retained by assignor). See GIFTS.

10. Hopkins v. Contra Costa County, 106 Cal. 566, 39 Pac. 933 (assignment for collection); Greig v. Riordan, 99 Cal. 316, 33 Pac. 550 (assignment for collection); Kelley v. Hampton, 22 Cal. App. 68, 133 Pac. 339. See infra, § 43.

11. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

12. Fidelity Savings & Loan Assn. v. Rodgers, 180 Cal. 683, 182 Pac. 426; Estate of Webb, 49 Cal. 541 (assignor merely expressed intention to make a gift of an insurance policy).

13. Smitten v. McCullough (Cal.), 189 Pac. 686; Fidelity Savings & Loan Assn. v. Rodgers, 180 Cal. 683, 182 Pac. 426; Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149; Pullen v. Placer County Bank, 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83; Estate of Webb, 49 Cal. 541; Belden v. Farmers' etc. Bank, 16 Cal. App. 452, 118 Pac. 449; The Elmbank, 72 Fed. 610. See, also, supra, § 17.

assignment, and which is unexecuted as a gift, and is not supported by any consideration, cannot be upheld as an equitable assignment.[14] Within this rule, however, an extension of time by a creditor may be a sufficient consideration,[15] or it may consist of an antecedent debt.[16] And in the case of conflicting successive equitable assignments of the same claim, an antecedent indebtedness constitutes a valuable consideration within the protection of the equitable doctrine relating to bona fide purchasers.[17] Equity will not decree specific performance of an equitable assignment where the terms are unconscionable and the consideration is grossly inadequate. While performance will not be refused, it will be granted only on terms that are fair and reasonable.[18]

Notice and Consent.

§ 25. Necessity and Effect of Notice.—Upon the assignment of a chose in action, title thereto is vested in the assignee, and notice to the debtor of the assignment is not necessary to the acquisition or perfection of the right or title of the assignee.[19] But, in order to protect his rights, the assignee must notify the debtor of the assignment,

14. Fidelity Savings & Loan Assn. v. Rodgers, 180 Cal. 683, 182 Pac. 426.

15. Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820.

16. Greenlee v. Los Angeles Trust etc. Bank, 171 Cal. 371, 153 Pac. 383; Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 Pac. 375; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820.

17. Smitton v. McCullough (Cal.), 189 Pac. 686 (rejecting the rule laid down in The Elmbank, 72 Fed. 610, that an antecedent debt is not a valuable consideration within the protection of the equitable doctrine of bona fide purchaser).

18. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149 (refusing exorbitant interest on loan made for an assignment of an heir's expectancy). See generally, EQUITY; SPECIFIC PERFORMANCE.

19. Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627; Morgan v. Lowe, 5 Cal. 325, 63 Am. Dec. 132; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247. See infra, § 35, as to priorities of successive assignees.

since the latter is entitled to all setoffs and defenses he may have or may acquire against the assignor until he is notified of the assignment.[20] It is also necessary that the assignee give notice of the assignment to the debtor in order to protect himself against the claims of subsequent bona fide assignees of the chose in action.[1] It is not necessary, however, for the assignee to put his assignment on file or to give notice of it to other persons who might be about to take a second assignment,[1a] or who have succeeded to the rights of the assignor.[2] The rule of caveat emptor—so far as any interest acquired as against third parties is concerned—applies in such cases. If the assignor has no title, third parties can acquire no rights as against the assignee, whether they have notice or not.[2a] Hence, while a debtor will be protected in the payment of money to the assignor after an assignment but prior to notice thereof,[3] he will not be protected by payment, after notice, either to the assignor,[4] or to a garnisheeing creditor of the assignor, even though the garnishment was served prior to the notice but subsequent to the assign-

20. See infra, § 37.

1. Smitton v. McCullough (Cal.), 189 Pac. 686; Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627. See infra, §§ 35, 37.

1a. Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 692.

2. Widenmann v. Weniger, 164 Cal. 667, 130 Pac. 421 (applying rule to garnisheeing creditor of assignor). See Henrickson v. Smith, 2 Cal. Unrep. 187 (where it was held that a debtor is justified in treating with an assignee as owner of an assigned claim, if without notice or knowledge of any frauds connected with the assignment).

2a. Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962 (judgment); Mitchell v. Hockett, 25 Cal. 544 (judgment).

3. McCarthy v. Mt. Tecarte Land & W. Co., 110 Cal. 687, 43 Pac. 391; Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820; Hogan v. Black, 66 Cal. 41, 4 Pac. 943; Bank of Stockton v. Jones, 65 Cal. 437, 4 Pac. 418 (rule applied to payment of promissory note after maturity).

4. Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627; McCloskey v. City and County of San Francisco, 66 Cal. 104, 4 Pac. 1092; Pope v. Huth, 14 Cal. 403. But see Tatsuno v. Pedersen, 21 Cal. App. 585, 132 Pac. 608 (holding that this rule does not apply to an assignment by a building contractor of such sum as shall be found due him on the final settlement of his contract).

ment.[5] And after notice of an assignment the debtor is bound to apply the fund according to the terms thereof.[6]

Notice to the holder of a fund is sufficient to preserve the priority of the assignee as against a prior notice given thereafter to a subsequent holder of the fund by a subsequent attaching creditor of the assignor.[7]

§ 26. Form and Sufficiency of Notice.—No particular form of notice of an assignment is required to be given to the debtor. It may be oral or written.[8] But it must be sufficient to inform the debtor of the fact of the assignment of the chose in action.[9] And so it was held that when a notice of an assignment of a contract, written in the English language, was given to one who does not read or write English, the notice, in order to be effectual, must be sufficient, precise and complete enough to put the debtor fully on his guard as to the fact of such assignment, and to make him understand it.[10] Pursuant to the provisions of the code,[11] constructive notice is sufficient.[12] But the mere recording of an assignment does not constitute notice to the debtor of the assignment.[13]

5. Morgan v. Lowe, 5 Cal. 325, 63 Am. Dec. 132. See infra, § 36.

6. Belden v. Farmers' etc. Bank, 16 Cal. App. 452, 118 Pac. 449 (applying rule to equitable assignment).

7. Widenmann v. Weniger, 164 Cal. 667, 130 Pac. 421.

8. Smitton v. McCullough (Cal.), 189 Pac. 686.

9. Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820. And cases cited infra.

10. Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820.

11. See Civ. Code, § 19.

12. Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820; Suhr v. Metcalfe, 33 Cal. App. 59, 164 Pac. 407 (holding that an order upon an owner of a building by a contractor to a subcontractor and by the latter presented to the owner is sufficient notice to the owner to entitle him to withhold the amount due from the contractor, as provided by section 1184 of the Code of Civil Procedure); Smith v. Semon, 32 Cal. App. 640, 163 Pac. 1038 (holding that notice of an assignment in which the name of the assignee is left blank is sufficient to charge the debtor with notice that any subsequent settlement with the assignor is made at his peril); Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820.

13. Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820;

Notice may be given either to the debtor or to his duly authorized agent.[14] But under the rule that an agent has only such authority as the principal actually or ostensibly confers upon him, and that notice to the agent of facts not arising from or connected with the subject matter of his agency is not notice to the principal unless actually communicated to him, it has been held that, where the authority of an architect is specially conferred in a written contract for a building, he is not authorized to receive notice of the assignment of the building contract, so as to bind the owner of the building by such notice, if such authority is not expressly conferred.[15]

Whether notice of an assignment was given, and if given, whether the debtor understood it, and whether it was sufficient to put a prudent man upon inquiry, are questions of fact.[16]

§ 27. Consent of Debtor.—Ordinarily, the consent of the debtor is not necessary to the validity of an assignment, and the consequent transfer of the obligation on his part to the assignee.[17] And the rule applies to both legal and equitable assignments.[18] Thus, a drawee having notice of an equitable assignment of funds that are to come into his hands, is liable to the payee for the amount thereof, without an express promise to pay.[19]

Helmer v. Parsons, 18 Cal. App. 450, 123 Pac. 356 (rule applied to assignment of note and mortgage given to secure it).

14. Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247.

15. Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820. See AGENCY, vol. 1, p. 846, for the general rule.

16. Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820.

17. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Cunningham v. Norton, 5 Cal. Unrep. 35, 40 Pac. 491.

18. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Bibend v. Liverpool & L. Fire & Life Ins. Co., 30 Cal. 78; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247. See supra, § 17 et seq., as to equitable assignments.

19. See infra, §§ 29, 30.

A creditor cannot, however, bring an action at law upon a partial assignment of an entire demand without the consent of the debtor to such partial assignment.[20] And mere notice of the assignment in such a case is not equivalent to consent.[1] But the rule is otherwise in equity. Hence, it has been held that, without the debtor's consent to the assignment, a partial assignee may bring all the parties before the court and settle his claim where the rights of all can be determined in one proceeding.[2]

Partial Assignments and Orders.

§ 28. Rules Generally.—It is a well-established rule that courts of law do not recognize partial assignments of choses in action; and, hence, a partial assignee has no legal standing to enforce a partial assignment against a debtor who has not consented thereto.[3] This is on the theory that a creditor cannot divide an entire demand into distinct parts and maintain separate actions upon each, since this would subject the debtor to conditions to which he never assented, and involve him in embarrassments and responsibilities he never contemplated. And a creditor will not be permitted by assignment to enable others to do what he cannot do.[4] But where a debtor

20. Thomas v. Rock Island Gold etc. Min. Co., 54 Cal. 578; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247. See infra, § 28. See as to splitting causes of action in general, ACTIONS, vol. 1, p. 369.

1. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

2. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; The Elmbank, 72 Fed. 610. See infra, § 29.

3. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Clancy v. Plover, 107 Cal. 272, 40 Pac. 394; Garniss v. Superior Court, 88 Cal. 413, 26 Pac. 351; Zirker v. Hughes, 77 Cal. 235, 19 Pac. 423; Thomas v. Rock Island Gold etc. Min. Co., 54 Cal. 578; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Hassie v. God Is With Us Congregation, 35 Cal. 378 (rule applied to attachment proceedings); Leese v. Sherwood, 21 Cal. 151; Marziou v. Pioche, 8 Cal. 522; Title Ins. etc. Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247.

4. Clancy v. Plover, 107 Cal. 272, 40 Pac. 394; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. See

does not consent to a partial assignment, the assignee may go into equity, and there bring all the parties before the court and have his rights protected and enforced under the assignment.[5]

Consent of debtor to partial assignment.—While the debtor may insist upon his right to pay the original obligation in one payment, yet if he accepts an order of a part thereof, he becomes the debtor of the assignee to that extent, and an action may be brought against him for the amount of such partial order.[6] And payment to the creditor subsequently regardless of such accepted order is at his peril.[7]

If the debtor consents to the partial assignment, he thereby waives his right of objection thereto,[8] admits the original debt, and, to the extent of the sum called for in the assignment, becomes the debtor of the assignee, and assumes the obligation to pay only him.[9] And he will not be permitted to revoke such consent.[10] But mere notice of a partial assignment is not equivalent to consent on the part of the debtor, and does not impose upon him any legal obligation to pay the partial assignee.[11]

§ 29. Rule in Equity.—While the rule is well settled that a creditor cannot split his claim against a debtor, and by assignment of a portion thereof impose upon the

infra, § 42, as to actions by partial assignee. See ACTIONS, vol. 1, p. 369.

5. See infra, § 29.

6. Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231 (holding that he will not be permitted to revoke his acceptance). See infra, § 42, as to action by partial assignee.

7. Held v. Beach-Robinson Co., 32 Cal. App. 93, 162 Pac. 661.

8. Greenlee v. Los Angeles Trust etc. Bank, 171 Cal. 371, 153 Pac. 383; Thomas v. Rock Island Gold & S. Min. Co., 54 Cal. 578; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231. See Marziou v. Pioche, 8 Cal. 522 (holding that the right to object is personal to the debtor and cannot be claimed by a third person).

9. Greenlee v. Los Angeles Trust etc. Bank, 171 Cal. 371, 153 Pac. 383; Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231.

10. Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231.

11. See supra, § 27.

debtor, without his consent, the legal obligation to pay the same,[12] courts of equity, however, have long been accustomed to recognize and enforce the rights of partial assignees of choses in action although the debtor has not consented to the assignment. In such a case the partial assignee has the right to bring all the parties before the court and have his rights under the assignment determined.[13] And so, as between the parties to the assignment, a non-negotiable order for part of a particular fund or debt operates as an equitable assignment pro tanto;[14] and the consent of the debtor is not necessary to the validity of such an assignment.[15]

But it has been held that an order payable generally drawn against a consignment of goods to the drawee does not establish an equitable assignment pro tanto of the funds in the hands of the drawee, while the order remains

12. See supra, § 28.

13. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Thomas v. Rock Island Gold & S. Min. Co., 54 Cal. 578; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. See infra, § 42, as to actions by partial assignees.

14. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231.

15. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247. In Goldman v. Murray, supra, the court says (quoting from 1 Daniel on Negotiable Instruments, section 23): "But it has been held in numerous cases, and we think should now be regarded as law, that a non-negotiable order for part of a fund operates as an equitable assignment pro tanto. Clearly, this is the case when it has been accepted or assented to by the drawee. And when it has not been accepted, our own view is this: that a non-negotiable order for part of a fund does operate as an equitable assignment pro tanto as between the drawer and payee, because obviously so intended. But as between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt. And if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his debt in its entirety at once. But if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment as against all subsequent claimants, whether by assignment from the drawer, or by legal process served upon the drawee."

unaccepted by the drawee, and consequently that such an order may be revoked at the pleasure of the maker at any time before acceptance.[16] Likewise, the delivery of an ordinary check upon a bank for a portion of the fund on deposit to the credit of the drawer does not, prior to its presentation to the bank, operate as an assignment of the fund pro tanto.[17] And this rule applies to a check payable before or after the death of the drawer.[18] Hence it has been held that a check which was not certified or accepted or drawn against a special fund or for the precise balance of the deposit cannot be set off as a counterclaim in an action by the receiver of the bank against the holder of the check or a promissory note of the latter to the bank.[19]

§ 30. Orders on Whole of Particular Fund.—An order drawn by a creditor upon a debtor for the whole of a particular fund operates as an equitable assignment of the fund when such is the intention of the parties.[20] And

16. Harlan v. Gladding, McBean & Co., 7 Cal. App. 49, 93 Pac. 400.

17. Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93; Pullen v. Placer County Bank, 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283; Nassano v. Tuolumne County Bank, 20 Cal. App. 603, 130 Pac. 29; John M. C. Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347, 115 Pac. 59; Le Breton v. Stanley Contracting Co., 15 Cal. App. 429, 114 Pac. 1028. See Wade v. City and County Bank, 25 Cal. App. 675, 145 Pac. 145 (where it was held that a check drawn and made payable on a contingency which never in fact arose, did not create a trust or an equitable assignment). See BANKS.

18. Nassano v. Tuolumne County Bank, 20 Cal. App. 603, 130 Pac. 29.

19. Le Breton v. Stanley Contracting Co., 15 Cal. App. 429, 114 Pac. 1028. See Joyce v. Wing Yet Lung, 87 Cal. 424, 25 Pac. 545 (verbal acceptance of order by drawee held sufficient). See BANKS.

20. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517; Joyce v. Wing Yet Lung, 87 Cal. 424, 25 Pac. 545; Pope v. Huth, 14 Cal. 403; Pierce v. Robinson, 13 Cal. 116; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522; Ritter v. Stevenson, 7 Cal. 388; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247; Brady v. Ranch Mining Co., 7 Cal. App. 182, 94 Pac. 85.

It was said in Lawrence Nat. Bank v. Kowalsky, supra, that what was

it is not essential that the intention to make such assignment appear on the face of the order.[1] Moreover, the validity of such an assignment is not dependent upon the consent of the debtor,[2] or upon notice to him.[3]

The parties must intend to transfer a particular fund in order that an order drawn thereupon may operate as an equitable assignment, and hence an order payable generally and not out of any particular fund will not, before acceptance, operate as an equitable assignment to the holder of the order.[4] And the order must be based upon a valuable consideration to operate as an equitable assignment.[5]

Actual or potential existence of fund.—The fund upon which an assignment is to operate must be a specific fund actually existing or to come into existence in the future; but the fund need not be actually in being if it exists potentially and if it will in due course of things arise from a contract or arrangement already made or entered into when the assignment is made.[6]

V. OPERATION AND EFFECT.

In General.

§ 31. Rights and Securities.—An absolute assignment of a chose in action vests in the assignee all the right, title and interest, legal or equitable, of the assignor

said in Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283, was not intended to overrule Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

1. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

2. Pope v. Huth, 14 Cal. 403; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247.

3. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247.

4. Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283.

5. See supra, § 24.

6. See supra, § 17.

thereto, including all incidental rights, remedies, liens and securities available to the assignor.[7] Hence it has been held that an absolute and unqualified assignment of a chose in action in good faith by a creditor to a debtor vests in the assignee the right to the entire proceeds of the chose in action though greater than the debt for which it is assigned.[8] And under an absolute assignment an assignee may recover the whole amount of the claim although he owns only a portion of the demand.[9]

But the assignee does not acquire a greater right or interest than was possessed by the assignor, and hence is entitled only to such rights, remedies and securities as are included within the terms of the assignment, or are incidental thereto.[10] Thus, an assignment of a judgment, whether made before or after judgment has become final, gives the assignee no right of action against the sureties on the appeal bond.[11] And the mere assignment of moneys due or to become due under the contract is not an assignment of the contract.[12]

A void assignment transfers no interest to the assignee, and the creditors of the assignor may recover money paid

7. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518 (affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82; Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091; Tutt v. Davis, 13 Cal. App. 715, 110 Pac. 690. See Brock v. Pearson, 87 Cal. 581, 25 Pac. 963 (holding that a deed to a portion of land for which the grantor holds only an executory contract of purchase operates as an assignment of a proportionate interest in the contract). See infra, § 32, as to rights passing as incidents.

8. Nathan v. King, 51 Cal. 521.

9. Gradwohl v. Harris, 29 Cal. 150. See infra, § 43, as to right of action in assignee.

10. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Smith v. Pacific Bank, 137 Cal. 363, 70 Pac. 184; Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94; Lynip v. Alturas School Dist., 24 Cal. App. 426, 141 Pac. 835 (assignment of money to become due on completion of contract transfers only balance actually due when contract is executed); Tatsuno v. Pedersen, 21 Cal. App. 585, 132 Pac. 608. See infra, § 41, as to actions by assignee.

11. Chilstrom v. Eppinger, 127 Cal. 326, 78 Am. St. Rep. 46, 59 Pac. 696; Moses v. Thorne, 6 Cal. 87. See APPEAL AND ERROR, vol. 2, p. 1077.

12. Butler v. San Francisco Gas etc. Co., 168 Cal. 32, 141 Pac. 818.

by the debtor.[13] And an assignment of a void contract transfers no interest.[14] It has been pointed out that an assignment of an expectancy or a possibility not coupled with an interest transfers no present property interest, but it gives a right to a lien or charge upon the property when it falls into possession.[15]

§ 32. Incidental Rights.—The assignment of a debt ordinarily carries with it all rights that are incidental to it, and entitles the assignee to all remedies, liens or securities that could have been used, or made available by the assignor as a means of indemnity or payment.[16] This is on the theory that he who sells a security and receives his pay for it necessarily sells whatever claim or right the security is understood by the parties to represent.[17] Thus, an assignment of a note includes a mortgage given as security for the payment of the note as an incident to the assignment of the note.[18] And in the absence of any stipulation to the contrary, the covenants of the mortgage inure to the benefit of the assignee and may be enforced by him.[19] But an assignment of a mortgage does not carry the note with it, unless the parties so intend.[20]

13. Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 435; Ritter v. Stevenson, 7 Cal. 388.

14. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

15. See supra, § 11.

16. Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180; Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82; Warren v. Russell, 129 Cal. 381, 62 Pac. 75; Duncan v. Hawn, 104 Cal. 10, 37 Pac. 626 (laborer's lien transferred as an incident to the debt); Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94 (where it is held that an assignment of a bank passbook transfers an equitable title to any deposit represented by the book); Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091 (guaranty indorsed on lease).

"The transfer of a thing transfers all its incidents, unless expressly excepted." Civ. Code, § 1084. See infra, § 41, as to right of action by assignee.

17. Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

18. Hurt v. Wilson, 38 Cal. 263. See MORTGAGES.

19. Redman v. Purrington, 65 Cal. 271, 3 Pac. 882.

20. Cortelyou v. Jones, 132 Cal. 131, 64 Pac. 119.

And a mere inchoate right to create a lien is a personal right which cannot be assigned.[1]

Pursuant to the general rule stated, upon the assignment of a chose in action the right to interest thereon passes to the assignee as incidental thereto.[2] But costs of suit are only incidents of a verdict, and since a verdict is, from its nature, unassignable, an attempt to assign it will not pass the costs.[3]

§ 33. Imposing Liability on Assignee.—The code provides that

"The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise, except as provided by section 1466."[4]

This section does not forbid the assumption by a third person of the obligations of a contract between other parties, but merely forbids the relieving of a party thereto from his obligations without the consent of the creditor.[5]

1. Mills v. La Verne Land Co., 97 Cal. 254, 33 Am. St. Rep. 168, 32 Pac. 169 (mechanic's lien not perfected).

2. Marx v. Raley & Co., 6 Cal. App. 479, 92 Pac. 519 (assignment of cause of action for goods sold and delivered).

3. Lawrence v. Martin, 22 Cal. 173.

4. Civ. Code, § 1457; Enscoe v. Fletcher, 1 Cal. App. 659, 82 Pac. 1075 (holding that the right to withhold consent to the assignment of the burden of a contract under section 1457 of the Civil Code survives to the heirs of the contracting party).

The exception under section 1466 of the Civil Code refers to covenants running with land upon a grant of the land itself. See COVENANTS.

5. Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266; Montgomery v. De Picot, 153 Cal. 509, 96 Pac. 305 (contract for sale of land); French v. Powell, 135 Cal. 636, 68 Pac. 92 (holding that under a contract for city work, the original contractor for the work cannot shift the burden of the obligation of the bond to materialmen and laborers by assigning the contract, with the consent of the surety and of the city, without the consent of the parties entitled to sue upon the bond); Odd Fellows Sav. Bank v. Brander, 124 Cal. 255, 56 Pac. 1109 (contract for purchase and sale of land); Cutting Pack. Co. v. Packers Exch., 86 Cal. 574, 25 Pac. 52 (non-negotiable contract of sale of fruit); La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 42 (contract for sale of future crops); Brady v. Fowler, 31 Cal. App. Dec. 274; Freese v. Moore, 1 Cal. App.

And it is in harmony with the general rule that the mere assignment of rights under an executory contract does not cast upon the assignee any of the liabilities imposed by the contract upon the assignor.[6] Hence, an assignment of a contract as security for money advanced by an assignee imposes no liability upon him for performance of its terms.[7] But where, after an assignment is made, the executory provisions of the contract are fully performed, the benefit inuring solely to the assignee and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, it has been held that he is liable to the other party equally with the assignor.[8] And when the assignee takes the benefit of the contract, he also assumes its burden, so far as is apparent upon the face of the contract.[9] If, by its terms, the obligations of a written contract are expressly made binding upon the successors and the assigns of the parties thereto, no express assumption of those obligations by an assignee thereof is necessary.[9a]

§ 34. Rules as to Construction.—In construing the terms of an assignment, the cardinal rule, as in the case of the interpretation of any written instrument, is to determine the intention of the parties.[10] Conformably to

587, 82 Pac. 542 (although a release by an assignee, of the other party to a contract, without the consent of the assignor, concludes the latter, nevertheless the assignee is directly liable to him for the consideration agreed to be paid for the assignment); Royal v. Dennison, 4 Cal. Unrep. 851, 38 Pac. 39.

6. Lisenby v. Newton, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979.

7. Stone v. Owens, 105 Cal. 292, 38 Pac. 726.

8. Jones v. Albert, 161 Cal. 234, 118 Pac. 794; Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979; California Packing Corp. v. Emirzian (Cal. App.), 187 Pac. 77; McCarty v. Owens, 5 Cal. Unrep. 153, 41 Pac. 861.

9. Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52; La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42.

9a. Brady v. Fowler, 31 Cal. App. Dec. 274.

10. Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880; Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal.

general principles, their intention is to be determined from the terms of the instrument.[11] And where the assignment is in writing, and is made without fraud or mistake, and is not ambiguous, it is conclusive as to the intent of the parties.[12]

The assignment must be construed as a whole, and words or phrases which are wholly inconsistent with its nature, or the main intention of the parties, are to be rejected.[13] But the language of an assignment must be construed with reference to the facts and circumstances of the particular case. If the intention of the parties is fairly evident and they have actually given expression to it, no matter how inapt that expression may be, effect must be given to their intention.[14] And the circumstances under which an assignment was made may be considered in order to determine its meaning and scope, where the terms are uncertain or ambiguous.[15]

App. 337, 162 Pac. 1042; Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305; Belden v. Farmers' etc. Bank, 16 Cal. App. 452, 118 Pac. 449.

11. Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880; Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1642. See CONTRACTS.

12. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

13. Montgomery v. De Picot, 153 Cal. 509, 126 Am. St. Rep. 84, 96 Pac. 305 (rule applied to contract for sale of real estate running to purchaser and his "assigns").

14. Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880 (holding that an absolute assignment of all right and interest to a chose in action is not narrowed by a further assignment limited to certain dates); The Elmbank, 72 Fed. 610 (holding that a definite assignment of a portion of a claim will prevail over a general assignment in the same instrument of all the interest of the assignor).

And see Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962 (holding that an assignment by the judgment creditor to the plaintiff of each and every judgment entered of record in his name carried the judgment sued upon, which was entered in his favor prior to the assignment, in the absence of evidence of any previous assignment or transfer thereof); Thomas v. Fursman, 39 Cal. App. 278, 178 Pac. 870 (assignment in writing of all claims and demands of the assignor of any nature whatsoever held not limited by a further paragraph in the same instrument assigning all the assignor's claims arising between certain specified dates).

15. Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880; Norton v. White-

In determining the nature, scope and effect of an assignment, it must not be construed so as to lead to an absurdity or so as to render it invalid, where it is reasonably susceptible of a construction that will render it valid or will result in effectuating the manifest intention of the parties.[16] And where the assignment is contained in more than one written instrument, they should all be construed together to determine the intention.[17]

Equities and Priorities.

§ 35. Priorities of Successive Assignees.—Where successive equitable assignments of the same debt or chose in action have been made, and the equity of no assignee is intrinsically superior to that of the others, the order of priority of the assignees will be determined by the order of execution of the assignments.[18] But the time of creation is said to be the last element to be considered in determining the priority of equitable claims. An equitable claim which is prior in time can predominate over another only if the two interests are in all other respects equal.[19]

The rule is settled in California that as between successive assignees, of a chose in action, he will have the preference who first gives notice to the debtor, even if he

head, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154 (also holding that the subsequent conduct of the parties may be considered when explanatory of their intent).

16. Belden v. Farmers' etc. Bank, 16 Cal. App. 452, 118 Pac. 449 (stating that it will be presumed that the parties intended that the obligation arising therefrom was one that could be enforced); Lynip v. Alturas School Dist., 29 Cal. App. 158, 155 Pac. 109.

17. Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154 (assignment of contract as security for debt, and power of attorney to collect); Lynip v. Alturas School District, 29 Cal. App. 158, 155 Pac. 109; Belden v. Farmers' etc. Bank, 16 Cal. App. 452, 118 Pac. 449 (assignment of interests under a lease).

18. Smitton v. McCullough (Cal.), 189 Pac. 686; Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627; The Elmbank, 72 Fed. 610.

19. Smitton v. McCullough (Cal.), 189 Pac. 686.

is a subsequent assignee, provided at the time of taking it he had no notice of a prior assignment.[20] This is on the theory that an assignee of a chose in action must do everything toward taking possession that the subject admits.[1] But, as expressed in the foregoing statement of the rule, it is essential that the subsequent assignee have no notice of the prior assignment, otherwise he will be postponed to the prior assignee.[2] And an assignee who is a bona fide purchaser will be preferred over a volunteer irrespective of the date of giving notice.[3] It has been held that the transfer of the subject matter of the assignment does not operate to change the rights and priorities of the respective claimants, and that a prior assignee is not required to give a new notice of his assignment to such transferee in order to preserve his right of priority.[4]

§ 36. Priorities Between Assignee and Garnisheeing Creditor of Assignor.—It is a general rule that as between

20. Smitton v. McCullough (Cal.), 189 Pac. 686 (successive assignments of a fund); Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880; Widenmann v. Weniger, 164 Cal. 667, 130 Pac. 421 (rule applied to purchaser of chose in action at execution sale); Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627 (successive assignments of book accounts and bills receivable).

The courts are divided upon the question of the necessity of notice of an assignment to the debtor to determine the rights of successive assignees. The rule adopted by the California supreme court is in accord with that prevailing in the federal courts, several of the state courts, and the English courts. New York, and some of the other state courts, however, have refused to follow this rule, and hold that a prior assignee will be preferred even though a prior notice is given by subsequent assignee; Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627. And see Fore v. Manlove, 18 Cal. 436, following the New York rule.

1. Widemann v. Weniger, 164 Cal. 667, 130 Pac. 421.

In Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627 (where the court in stating the reason for the rule, quoted from Dearle v. Hall, 3 Russ. 1, 38 Eng. Reprint, 475.)

2. Smitton v. McCullough (Cal.), 189 Pac. 686; Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627.

3. The Elmbank, 72 Fed. 610.

4. Widemann v. Weniger, 164 Cal. 667, 130 Pac. 421.

an assignee of a chose in action and garnisheeing creditors of the assignor, an assignment takes precedence over a subsequent garnishment.[5] And it is held that the rule is not changed by the fact that the garnishment was levied before notice of the assignment was given to the debtor.[6]

It has been held that after the presentation of an order which operates as an equitable assignment, the debt due by the debtor is no longer subject to attachment by the creditors of the drawer.[7] But the delivery of a check drawn upon a bank for a portion of a deposit is not, before acceptance by the bank, within the operation of this rule.[8] If a debtor is summoned as garnishee, it is his duty in answering to set up any assignment of the debt of which he has notice; otherwise, if judgment passes against him as a debtor of the assignor because of his failure to set up the assignment, it will not afford protection against a suit by the assignee.[9]

Since a chose in action has no definite situs but must follow the person of its owner, an assignment by an as-

5. Widemann v. Weniger, 164 Cal. 667, 130 Pac. 421; McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69 (holding that an agreement of a mortgagor that the mortgagee is to receive the purchase price of the property from a purchaser creates an equitable assignment which prevails over a subsequent garnishment of the mortgagor's interest); Early v. Redwood City, 57 Cal. 193; Walling v. Miller, 15 Cal. 38; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522 (rule applies to equitable relief as well as legal assignments).

6. McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69; Walling v. Miller, 15 Cal. 38; Morgan v. Lowe, 5 Cal. 325, 63 Am. Dec. 132; Title Ins. & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245, 247 (but the supreme court in denying a petition for a rehearing in this case held it unnecessary to the decision to decide that an assignment would be good as against a levy made upon the fund after the assignment but before notice thereof was given to the debtor).

7. Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

8. Donohoe-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93; Pullen v. Placer County Bank, 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83; John M. C. Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347, 115 Pac. 59. See supra, § 30.

9. Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

signor who is a resident of another state of a debt due from a citizen of this state vests title thereto in the assignee, and such debt cannot be thereafter attached in this state by a creditor of the assignor. And the application of the rule is unchanged by the fact that the assignment was made by a foreign corporation in a state other than that of its charter, for the benefit of its creditors.[10]

§ 37. Equities Available Against Assignees.—The rule is well settled that an assignee takes a chose in action subject to all equities and defenses that may be held by the debtor at the time he is notified of the assignment.[11]

Section 1459 of the Civil Code, providing that the assignee of a non-negotiable written contract for the payment of money or personal property takes it "subject to all the equities and defenses existing in favor of the maker at the time of the indorsement,"[11a] and section 368

10. Fenton v. Edwards, 126 Cal. 43, 77 Am. St. Rep. 141, 46 L. R. A. 832, 58 Pac. 320.

11. Kohn v. Sacramento Electric etc. R. Co., 168 Cal. 1, 141 Pac. 626; Widemann v. Weniger, 164 Cal. 667, 130 Pac. 421; Fleming v. Law, 163 Cal. 227, 124 Pac. 1018; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; San Jose Ranch Co. v. San Jose Land & W. Co., 132 Cal. 582, 64 Pac. 1097; Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Pacific Rolling Mill Co. v. English, 118 Cal. 123, 50 Pac. 383; St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876; Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820; Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94 (assignee is barred by laches of his assignor); Hogan v. Black, 66 Cal. 41, 4 Pac. 943; First Nat. Bank of San Francisco v. Golden, 19 Cal. App. 501, 126 Pac. 498; Helmer v. Parsons, 18 Cal. App. 450, 123 Pac. 356; Castor v. Bernstein, 2 Cal. App. 703, 84 Pac. 244. But see Morgan v. Lowe, 5 Cal. 325, 63 Am. Dec. 132 (holding that notice of assignment is not necessary to charge the debtor). See infra, § 41.

11a. Hammond Lumber Co. v. Fanta, 179 Cal. 652, 178 Pac. 503, (holding section 1140 of the Civil Code, relating to a present sale of personal property, not applicable to a case of the transfer of a non-negotiable obligation); Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712 (mortgage); Long Beach School Dist. v. Jutge, 129 Cal. 409, 62 Pac. 36 (order for payment of installments due on building contract); First Nat. Bank v. Falkenhan, 94

of the Code of Civil Procedure, providing that an action upon an assigned thing in action is "without prejudice to any setoffs or other defense, existing at the time of, or before notice of the assignment,"[11b] are construed as though passed at the same moment of time and as parts of the same statute. The rule as declared by these sections is that a debtor may avail himself of any setoff or defense, acquired before notice of the assignment.[12]

This is the rule which prevailed in equity.[13] And it

Cal. 141, 29 Pac. 866 (non-negotiable promissory note); Dollar v. International Banking Corp., 13 Cal. App. 331, 109 Pac. 499 (bank deposit receipt); Dyer v. International Banking Corp., 262 Fed. 292 (note accompanied by contract).

11b. Hall v. Thurston, 176 Cal. 738, 171 Pac. 285 (promissory note transferred after maturity); Machado v. Borges, 170 Cal. 501, 150 Pac. 351 (judgment); Moscarel v. Lynch, 165 Cal. 476, 132 Pac. 1034; Neale v. Head, 133 Cal. 42, 65 Pac. 576 (applying rule in case of purchase of negotiable promissory note at judicial sale); Hays v. Plummer, 126 Cal. 107, 58 Pac. 447; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786 (judgment); Benham v. Connor, 113 Cal. 168, 45 Pac. 258; Graves v. Mining Co., 81 Cal. 303, 22 Pac. 665 (assignment of note after maturity); Bank of Stockton v. Jones, 65 Cal. 437, 4 Pac. 418 (assignment of note after maturity); Porter v. Liscom, 22 Cal. 430 (judgment); Simons v. Porterfield, 33 Cal. App. Dec. 166, 193 Pac. 172 (non-negotiable instrument); Stern v. Sunset Road Oil Co., 32 Cal. App. Dec. 145, 190 Pac. 650; Suhr v. Metcalfe, 33 Cal. App. 59, 163 Pac. 1040 (assignment of right to final payment upon building contract before payment was due); Watkins v. Glas, 5 Cal. App. 68, 89 Pac. 840.

Section 368 of the Code of Civil Procedure provides, in addition to the language quoted, supra, in the text, as follows: "But this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity." It would seem to follow that in every instance other than the one specified in the exception the general rule of section 368 is applicable. McKenny v. Ellsworth, 165 Cal. 326, 132 Pac. 75.

12. Briggs v. Crawford, 162 Cal. 124, 121 Pac. 381 (mortgage); First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45 (citing Wright v. Levy, 12 Cal. 257); St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876; Lucas v. Pico, 55 Cal. 126 (non-negotiable note); Helmer v. Parsons, 18 Cal. App. 450, 123 Pac. 356; Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091 (contract of guaranty to secure payment of rent). And see cases cited supra.

13. McCabe v. Grey, 20 Cal. 509.

is immaterial that the assignee had no notice or knowledge of such equities or defenses.[14]

Right of setoff distinguished from recoupment.—The right of "setoff" as used in the code sections above quoted differs from "recoupment" in that it is more properly applicable to demands independent in their nature and origin, while recoupment implies a cutting down of a demand by deductions arising from the same transaction; and "counterclaim" as used in the code includes both recoupment and setoff.[15] Thus a debtor may fortify himself against the coming suit of his creditor by the purchase of any cross-demands which may be counterclaimed when that suit shall come; and between them an assignee has no standing until he shall have given notice of the assignment. And such cross-demand may be claimed as a setoff though not due at the time the debtor received notice of the assignment of his obligation, provided that it has matured before the commencement of the action.[16] Hence, an assignee is concluded by a release executed by the assignor previous to the assignment,[17] but he will be allowed to prove in avoidance of an offset of the debtor a countervailing debt of the debtor to the assignor which is more than sufficient to counterbalance the same.[18]

Application of rule.—The rule that the assignee of a non-negotiable instrument takes it subject to equities applies to contracts generally, including savings bank books,[19] building contracts,[20] promissory notes and real

14. San Jose Ranch Co. v. San Jose Land & W. Co., 132 Cal. 582, 64 Pac. 1097.

15. St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876. See, also, Stern v. Sunset Road Oil Co. (Cal. App.), 190 Pac. 650 (distinguishing "setoff" and "recoupment"). See SETOFF AND COUNTERCLAIM.

16. St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876.

17. Rauer v. Fay, 110 Cal. 361, 42 Pac. 902; Castor v. Bernstein, 2 Cal. App. 703, 84 Pac. 244.

18. Davis v. Rawhide Gold Min. Co., 15 Cal. App. 108, 113 Pac. 898.

19. First Nat. Bank of San Francisco v. Golden, 19 Cal. App. 501, 126 Pac. 498.

20. First Nat. Bank v. Perris Irr.

property mortgages given as security therefor,[1] leases and guaranties to secure payments of rent reserved,[2] and judgments.[3] But upon the reversal of a judgment, the assignee occupies the same position as the assignor.[4]

In respect to a non-negotiable chose in action which is illegal when issued, and illegal for all time, it has been held that it is immaterial for what consideration it may have been transferred or in what form it may have been taken.[5]

§ 38. Latent Defects—Equities of Third Persons.—The assignee of a non-negotiable chose in action occupies the same position as the assignor, and hence cannot sue if his assignor could not have maintained an action.[6] But the general rule that an assignee takes subject to all equities which existed against the assignor is generally limited to those equities residing in the original obligor or debtor, and is not extended to those residing in some third person against the assignor.[7] And so, while an assignee of a judgment is bound to inquire into the defense of the debtor, as he has the means to do this, it is not required of him that he inquire into latent equities of third persons.[8]

Void claims or demands.—It is well settled that a void claim or demand cannot be vitalized by an assignment. Hence, an assignee of a contract that is contrary to pub-

Dist., 107 Cal. 55, 40 Pac. 45; Suhr v. Metcalfe, 33 Cal. App. 59, 164 Pac. 407.

1. Helmer v. Parsons, 18 Cal. App. 450, 123 Pac. 356.

2. Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091; Davis v. Rawhide Gold Min. Co., 15 Cal. App. 108, 113 Pac. 898.

3. Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Jones v. Chalfant, 55 Cal. 505; Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655; Hobbs v. Duff, 23 Cal. 596; Wright v. Levy, 12 Cal. 257.

4. Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

5. People v. Board of Supervisors, 11 Cal. 170 (county warrants).

6. See supra, § 37, and infra, § 41.

7. First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45; Wright v. Levy, 12 Cal. 257.

8. Wright v. Levy, 12 Cal. 257.

lic policy and, therefore, invalid, takes only the rights of his assignor and cannot recover if his assignor could not.[9] While one who has paid moneys under a void contract is the equitable owner thereof, and may assign his right to recover them, it has been held that an assignee cannot recover if his assignor is not permitted to sue on the claim. Thus, an owner of moneys lost at gambling is the equitable owner thereof, but such a claim has no standing in the courts, and recovery cannot be had thereon.[10]

§ 39. Equitable Estoppel in Favor of Assignee.—An assignment carries with it all the whole right, title and interest of the assignor, and if the other party to the contract recognizes the assignment, he is estopped from subsequently denying the assignability of any particular portion of the contract.[11] And a prior assignee may be estopped by laches in presenting an assigned claim as against a subsequent assignee who has secured a settlement of it.[12] It has been held, also, that an assignee who is a purchaser in good faith and for value of a chose in action, not negotiable, from one to whom the owner has transferred the apparent ownership, obtains a valid title as against such owner, even though the person from whom he obtained it had no title.[13] But an estoppel will be created in favor of an assignee only when he is a bona

9. Rued v. Cooper, 109 Cal. 682, 34 Pac. 98 (gambling debt); Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846 (contract to procure business for an attorney and to receive a percentage of the fee as compensation therefor); Mayer v. Child, 47 Cal. 142.

10. Rued v. Cooper, 109 Cal. 682, 34 Pac. 98.

11. Simmons v. Zimmerman, 144 Cal. 256, 1 Ann. Cas. 850, 79 Pac. 451; In re Garcelon's Estate, 104 Cal. 570, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414.

12. Wilson v. Heslep, 4 Cal. 300. See discussion of rule in Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627.

13. Thompson v. Toland, 48 Cal. 99; First Nat. Bank of San Francisco v. Golden, 19 Cal. App. 501, 126 Pac. 498.

fide purchaser without notice.[14] And it is declared that an antecedent consideration is not sufficient to raise an estoppel in his favor under this rule.[15]

VI. ACTIONS.

In General.

§ 40. By Assignor.—After an absolute assignment an assignor has no cause of action upon the claim assigned.[16] Nor can the assignor maintain an action upon a chose in action assigned as security for repayment of advances,[17] unless the debt so secured is paid.[18] But he may sue upon such assigned claim with the consent of the assignee,[19] or he may make the assignee a party plaintiff in an action to enforce his rights thereunder.[20] And it is competent for an assignor to assert an equitable right retained by him in an assigned claim by intervening in an action upon such claim.[1]

Action by assignor against assignee.—An assignment creates a contractual relation between the assignor and

14. San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 Pac. 325; Womble v. Wilbur, 3 Cal. App. 535, 86 Pac. 916.

15. First Nat. Bank of San Francisco v. Golden, 19 Cal. App. 501, 126 Pac. 498.

16. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

17. Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 Pac. 375 (holding that the right of the assignee to hold the security is not affected by the fact that the obligation on which he holds it is barred by the statute of limitations).

18. An assignor has no right of action against an assignee for an obligation assigned as security until the advances made thereon have been repaid; Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 Pac. 375; Myers v. South Feather Water Co., 10 Cal. 579.

19. Consolidated Nat. Bank v. Hayes, 112 Cal. 75, 44 Pac. 469 (rule applied to note and mortgage delivered as security for a debt without an indorsement or assignment in writing).

20. Cerf v. Ashley, 68 Cal. 419, 9 Pac. 658.

1. Cobb v. Doggett, 142 Cal. 142, 75 Pac. 785; Gradwohl v. Harris, 29 Cal. 150.

assignee, and hence may result in an action between them for breach of its terms. Thus, an action may be brought by the assignor against the assignee for the consideration of the assignment;[2] or for the failure of the assignee to perform the obligations of the terms of an executory contract, the assignor of an executory contract being held to stand in the relation of surety for the performance of the obligation of the assignee.[3]

§ 41. By Assignee.—An assignee of a chose in action ordinarily acquires all the rights and remedies possessed by the assignor for its enforcement,[4] subject, however, to the defenses that may be urged against the assignor.[5] Thus, he may bring an action for breach of the assigned contract, and include therein the right to rescind the contract for such breach and to recover money expended under the contract by the assignor.[6] And it has been held that an assignment of all the right, title and interest of the assignor in an undertaking given on appeal from a judgment for the possession of real estate, and in the amount thereby secured, is broad enough to enable the assignee to recover for use and occupation with costs, pending the appeal.[7]

Since an assignment can impart no new virtue to the thing itself, and the assignee acquires no greater rights than were possessed by the assignor,[8] it is a general rule that an assignee cannot maintain an action upon an as-

2. McCarthy v. Pope, 52 Cal. 561; Fruit v. Phelps, 4 Cal. 282.

3. Cutting Packing Co. v. Packers' Exch., 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52. See GUARANTY.

4. Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82; Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091. See infra, § 43, as to right of assignee to sue in his own name; and infra, § 44, as to an assignment of a chose in action pendente lite.

5. See supra, § 37. And see supra, § 38, to the point that the assignee cannot recover on the assigned claim if his assignor could not.

6. Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

7. Murdock v. Brooks, 38 Cal. 596.

8. See supra, §§ 31, 32, 37.

signed chose in action where his assignor did not have such right.[9] And so, an action cannot be maintained by the assignee of a contract which is void because it is contrary to public policy.[10]

A cause of action must exist in the assignee at the time of bringing the action. Hence, it has been held that an assignment must be made before an action can be maintained upon the assigned claim by the assignee, and that a ratification of the assignment after action is brought by the assignee is too late.[11]

Capacity to sue.—An assignee is not prevented from bringing an action upon a valid claim merely because of the lack of capacity of the assignor to sue thereon.[12] While an assignee of a claim against a partnership by one of the partners cannot bring an action thereon at law,[13] if, however, an assignment by all the partners of a partnership contract to the third party has been made, whereby the interests of the partners become merged and vested in the assignee, he may sue on the contract in his

9. Burr Creamery Co. v. City of Los Angeles, 175 Cal. 649, 166 Pac. 805; Smith v. Pacific Bank, 137 Cal. 363, 70 Pac. 184; Rued v. Cooper, 109 Cal. 682, 34 Pac. 98; Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846; Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Anderson v. Neal Institutes Co., 37 Cal. App. 174, 173 Pac. 779.

10. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846 (contract to procure clients for an attorney for a portion of the fee).

11. Read v. Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555 (where ratification of an attempted assignment, made by the directors of a corporation after an action was commenced on the account by the assignee, was held too late to be availing to the assignee); Wittenbrock v. Bellmer, 57 Cal. 12 (holding that proof of the ratification of the assignment averred in a supplemental complaint is unavailing, since if a party had no cause of action at the time of commencing the suit, he cannot maintain it by filing a supplemental complaint founded on matters which subsequently occurred).

12. Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 Pac. 783 (holding that an objection which goes merely to the capacity of the assignor to sue may be waived by failure to object thereto in an action by the assignee); Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451.

13. Bullard v. Kinney, 10 Cal. 60.

own name.[14] It has been held that the holder of a non-negotiable contract, indorsed in blank, may, after bringing suit thereon, fill up the indorsement with a special assignment to himself.[15]

Claim assigned as security.—An assignee of a chose in action assigned as security for advances may bring an action against the debtor for the whole amount of the claim.[16] And he may maintain an action thereon for the amount of the claim although the amount of the money advanced does not equal the money due under the claim assigned.[17]

Notice of assignment.—Notice of an assignment is not necessary before suit is brought by an assignee on an assigned matured claim.[18] But the assignee of an executory contract must give notice of its assignment before he is entitled to demand performance of its terms.[19]

Joinder.—A cause of action for work and labor performed for the defendant by the plaintiff may be united with a similar one assigned to him.[20] And the owner of land may join in the same complaint a claim for damages, as assignee, caused by a trespass on the land while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land.[1]

§ 42. By Partial Assignee.—Under a code provision,[2] in effect, that, with certain exceptions, an action must be

14. Jauman v. McCusick, 166 Cal. 517, 137 Pac. 254.

15. Lucas v. Pico, 55 Cal. 126 (upon the principle that the holder of a non-negotiable contract is presumptively the owner).

16. Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 Pac. 375.

17. Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 Pac. 875. See infra, § 42.

18. Cunningham v. Norton, 5 Cal. Unrep. 35, 40 Pac. 491 (action on an assigned guaranty).

19. Doll v. Anderson, 27 Cal. 248.

20. Fraser v. Oakdale Lumber etc. Co., 73 Cal. 187, 14 Pac. 829.

1. More v. Massini, 32 Cal. 590; Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091. See as to joinder of causes of action generally, ACTIONS, vol. 1, p. 345 et seq.

2. Code Civ. Proc., § 367. (Practice Act, § 4). See infra, § 43.

prosecuted in the name of the real party in interest, it is held that a partial assignee may recover in his own name if the debtor had consented to the partial assignment.[3] And pursuant to sections 430 and 434 of the Code of Civil Procedure providing that defect of parties is ground for demurrer, but is waived by failure to demur, it is held that the failure of a partial assignee to join the assignor in an action upon a partial assignment is waived by failure of the debtor to demur specially on that ground.[4]

An action of assumpsit will not lie against a debtor by an assignee of an equitable assignment of a portion of a demand.[5] And an assignment of a portion of a debt does not make the assignee a joint owner of the whole debt, and he is not a necessary party to its recovery.[6] But an absolute assignment of a demand enables the assignee to sue for and recover the whole debt, even though by the assignment he acquired only a portion of the demand.[7]

The rule against splitting causes of action is held not to apply to an action by an assignee for conversion against a bailee, though the goods converted were only a portion of those consigned.[8] And neither does it apply to an assignment of funds in the hands of a receiver although the funds are subject to a lien for costs and fees of receiverships.[9]

§ 43. Suit by Assignee in His Own Name.—The common-law rule that a chose in action could not be transferred by assignment so as to enable the assignee to sue

3. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231. As to partial assignments, see supra, §§ 28, 29.

4. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

5. Hassie v. God Is With Us Congregation, 35 Cal. 378.

6. Leese v. Sherwood, 21 Cal. 151.

7. Gradwohl v. Harris, 29 Cal. 150.

8. Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161. As to splitting causes of action generally, see ACTIONS, vol. 1, p. 369 et seq.

9. Garniss v. Superior Court, 88 Cal. 413, 26 Pac. 351.

thereon in his own name has been materially modified, if not entirely superseded, by the code provisions to the effect that, with the exception of suits by executors or administrators or trustees of an express trust, every action must be prosecuted in the name of the real party in interest.[10] In construing the code provisions the courts have followed the rule that whoever holds the legal title to a demand is the real party in interest, and may sue thereon in his own name.[11] And it has been held that an absolute assignment of an entire demand enables an assignee to maintain an action for the whole debt in his own name, though by agreement with the assignor only a portion of the demand was assigned to him,[12] or he is a mere agent for collection for the assignor,[13] or the chose in action was assigned to him as collateral security for

10. Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180; Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Herman v. Hecht, 116 Cal. 553, 48 Pac. 611; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Woodsum v. Cole, 69 Cal. 142, 10 Pac. 331; More v. Massini, 32 Cal. 590; McLaren v. Hutchinson, 22 Cal. 187, 83 Am. Dec. 59; Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149; First Nat. Bank of Chico v. Tyler, 21 Cal. App. 791, 132 Pac. 1053; Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091; Code Civ. Proc., §§ 367, 369. And see the following cases under the Practice Act, § 4, corresponding with section 367, Code Civ. Proc.; Moore v. Waddle, 34 Cal. 145; Lazard v. Wheeler, 22 Cal. 139; Caulfield v. Sanders, 17 Cal. 569; Gray v. Garrison, 9 Cal. 325; Ryan v. Maddux, 6 Cal. 247. See PARTIES.

11. Iowa etc. Land Co. v. Hoag, 132 Cal. 627, 64 Pac. 1073; Cortelyou v. Jones, 132 Cal. 131, 64 Pac. 119; Consolidated Nat. Bank v. Hayes, 112 Cal. 75, 44 Pac. 469; Works v. Merritt, 105 Cal. 467, 38 Pac. 1109; Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 33 Pac. 550; Grant v. Heverin, 77 Cal. 263, 18 Pac. 647, 19 Pac. 493; O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236. And see PARTIES.

12. Gradwohl v. Harris, 29 Cal. 150.

13. Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2; Hopkins v. Contra Costa County, 106 Cal. 566, 39 Pac. 933; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913 (holding that the equitable interest retained by the assignor in such cases is considered to be of no moment to the debtor); Grant v. Heverin, 77 Cal. 263, 18 Pac. 647, 19 Pac. 493; Kelley v. Hampton, 22 Cal. App. 68, 133 Pac. 339; Ingle Mfg. Co. v. Scales, 36 Cal. App. 410, 172 Pac. 169.

the performance of an obligation from the assignor to the assignee.[14]

The rule is applied to equitable as well as legal assignments, and the assignee of an equitable assignment is held to be the real party in interest who may prosecute the action in his own name.[15]

§ 44. Substitution—Assignments Pendente Lite.—It is well settled that, under section 385 of the Code of Civil Procedure, which prescribes the proceedings following the assignment of a cause of action during the pendency of the case,[15a] the assignee has no absolute right to an order substituting him as party to the action. The court is to exercise its discretion in granting or refusing such order in view of all the circumstances attending the application.[16] But an assignment divests the assignor of all power to control the case. The assignee now has the

14. Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 Pac. 375; Works v. Merritt, 105 Cal. 467, 38 Pac. 1109; Ginocchio v. Amador Canal etc. Co., 67 Cal. 493, 8 Pac. 29; Warner v. Wilson, 4 Cal. 310; Ingham v. Weed, 5 Cal. Unrep. 645, 48 Pac. 318 (applying rule to assignment of a mortgage absolute on its face).

15. Jauman v. McCusick, 166 Cal. 517, 137 Pac. 254; Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180; National Bank of D. O. Mills & Co. v. Herold, 74 Cal. 603, 5 Am. St. Rep. 476, 16 Pac. 507 (rule applied to assignment of warrant drawn by state controller); Fruit v. Phelps, 4 Cal. 282; Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149.

15a. Estate of Baker, 170 Cal. 578, 150 Pac. 989.

16. McKendrick v. Western Zinc Min. Co., 165 Cal. 24, 130 Pac. 865; Anderson v. Schloesser, 153 Cal. 219, 94 Pac. 885 (holding that an assignment by a defendant of attached real property is not such a transfer of interest as to entitle the transferee to be substituted as party defendant under section 385 of the Code of Civil Procedure, and this is true irrespective of whether service of the summons upon the original defendant was personal or by publication); Fay v. Steubenrauch, 138 Cal. 656, 72 Pac. 156; Emerson v. McWhirter, 128 Cal. 268, 60 Pac. 774 (denying motion for substitution or appeal by assignee of judgment of prevailing party, where motion showed that the same attorney represented the assignee and assignor); Hentig v. Johnson, 12 Cal. App. 423, 107 Pac. 582. For a discussion of the rule under Code Civ. Proc., § 385, see ABATEMENT AND REVIVAL, vol. 1, p. 53 et seq.

right to control it, either in the name of the plaintiff or by having himself substituted by order of court.[17]

Where, after an assignment by the plaintiff pending suit, the action is continued in the name of the plaintiff without objection, and no request is made by defendant for a substitution, the latter is not prejudiced by the fact that a judgment was obtained in the name of the plaintiff rather than in the name of the assignee.[18] And any action taken thereafter in the case by the assignor who still remains the nominal party to the record, in the absence of evidence to the contrary, will be presumed to be for and on behalf of the assignee, that he assented thereto and that it was taken in good faith.[19] But the assignee will be protected against fraud on the part of the assignor.[20] In the absence of any showing of a transfer of interest, the court has no power to substitute another as plaintiff on the theory that the person substituted was the real party in interest at the commencement of the action.[1]

17. Walsh v. Soule, 66 Cal. 443, 6 Pac. 82; Walker v. Felt, 54 Cal. 386; Camarillo v. Fenlon, 49 Cal. 202; Harlan Douglas Co. v. Moncur, 19 Cal. App. 177, 124 Pac. 1053; Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383. See Northern Ry. Co. v. Jordan, 87 Cal. 23, 25 Pac. 273 (holding assignee has a right to be substituted for plaintiff if he so desires); Thomas v. Fursman, 39 Cal. App. 278, 178 Pac. 870 (the authority of an attorney to appear and ask for the substitution, as plaintiff, of one to whom a claim has been assigned during the pendency of an action is presumed in the absence of evidence to the contrary). See ABATEMENT AND REVIVAL, vol. 1, p. 53.

18. Hohn v. Pauly, 11 Cal. App. 724, 106 Pac. 266.

19. Walsh v. Soule, 66 Cal. 443, 6 Pac. 82 (holding that plaintiff may, after judgment in his behalf is affirmed on appeal, prosecute an action on an appeal bond though in such case he sues as trustee of an express trust for the benefit of his grantee); Hentig v. Johnson, 12 Cal. App. 423, 107 Pac. 582 (judgment entered on motion by assignor against sureties on appeal bond).

20. Walker v. Felt, 54 Cal. 386 (setting aside order of dismissal based on unauthorized stipulation signed by assignor who was still nominal party to action).

1. Dubbers v. Goux, 51 Cal. 153.

The order of the court authorizing the substitution of an assignee is not subject to collateral attack.[2] But a motion to set aside a judgment against a grantor on the ground that it is void is a direct attack and may be made by an assignee of the grantor.[3]

Pleadings.

§ 45. In General.—As in the case of pleadings generally, the allegations of the pleadings relative to assignments are to be liberally construed, with a view to substantial justice between the parties.[4] Mere conclusions are to be avoided,[5] and only material allegations are to be pleaded.[6] Matters need not be stated in the complaint which are merely probative, such as an assignment and reassignment to plaintiff,[7] or the date upon which the assignment is made.[8]

Consideration.—It is not necessary to allege a consideration for an assignment in an action at law.[9] But since

2. Rowe v. Blake, 112 Cal. 637, 44 Pac. 1084 (subsequent assignee of judgment not permitted to attack collaterally execution issued in favor of a prior assignee).

3. McKendrick v. Western Zinc Min. Co., 165 Cal. 24, 130 Pac. 865; People v. Mullan, 65 Cal. 396, 4 Pac. 348 (assignment made after judgment).

Where an assignment is made during an appeal, the proper procedure is first to obtain an order of substitution in the trial court, and then make application to the appellate court for like substitution upon the presentation of such order. Fay v. Steubenrauch, 138 Cal. 656, 72 Pac. 156.

4. Estate of Wickersham, 153 Cal. 603, 96 Pac. 311; Code Civ. Proc., § 452; and see PLEADING.

5. Estate of Wickersham, 153 Cal. 603, 96 Pac. 311.

6. Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091.

7. McCaughey v. Schuette, 117 Cal. 223, 59 Am. St. Rep. 176, 46 Pac. 666, 48 Pac. 1088; Zany v. Rawhide Gold Min. Co., 15 Cal. App. 373, 114 Pac. 1026. See infra, § 46, as to pleading the assignment.

8. Union Collection Co. v. National Fertilizer Co., 7 Cal. Unrep. 244, 82 Pac. 1129 (holding as immaterial an allegation that assignment was made two days previous to completion of services).

9. Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Kelley v. Hampton, 22 Cal. App. 68, 133 Pac. 339; Krieger v. Feeny, 14 Cal. App. 538, 112 Pac. 901.

a consideration is absolutely vital to the creation of an equitable assignment,[10] it is necessary to allege and prove adequacy of consideration, and the facts showing such adequacy must be stated in the complaint. An allegation simply that the consideration was full and adequate would be useless as a mere conclusion.[11]

If the complaint is in equity for the specific performance of an agreement based on an equitable assignment, it must aver facts showing that the assignment was freely obtained and that the consideration therefor was full and adequate.[12] But it is said that it is not necessary to show the adequacy of the consideration in cases where the contract is made with the ancestor.[13]

Supplemental and amended complaints.—An assignment of a cause of action pending suit thereon must be set out in a supplemental complaint.[14] But, as has been stated, if a party has no cause of action at the time of its commencement, he cannot maintain it by filing a supplemental complaint founded on matters that have subsequently occurred.[15] It has been held, where an original complaint alleges an assignment of two promissory notes, and also states facts showing an equitable assignment, that an amended complaint containing the same allegations with the exception of the legal assignment by indorsement, states no new cause of action.[16] And there is no change in a cause of action on several assigned claims by the filing of an amended complaint,

10. See supra, § 24.

11. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149; Estate of Wickersham, 153 Cal. 603, 96 Pac. 311.

12. Bridge v. Kedon, 163 Cal. 493, 43 L. R. A. (N. S.) 404, 126 Pac. 149; Estate of Wickersham, 153 Cal. 603, 96 Pac. 311.

13. Estate of Wickersham, 153 Cal. 603, 96 Pac. 311; Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962.

14. Ford v. Bushard, 116 Cal. 273, 48 Pac. 119. See ABATEMENT AND REVIVAL, vol. 1, p. 58.

15. See supra, § 41.

16. Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

the effect of which is to dismiss the action as against one of the defendants.[17]

§ 46. Averments as to Assignment.—The fact of assignment or transfer to the plaintiff must be averred in the complaint. And it should appear that at the time of the commencement of the action the plaintiff was the owner and holder thereof. Without such an averment the complaint does not state facts sufficient to constitute a cause of action.[18] An allegation that all the interest of another was acquired has been held insufficient.[19] However, as against the force of a general demurrer, an allegation of assignment, though inartificial or informal, may be sufficient.[20] A partial assignee must allege consent of the debtor to a partial assignment to recover in an action at law, but such an averment is immaterial in equity, and hence, under the code, a complaint is not demurrable for lack of facts, if it fails to contain such averment.[1] And where an action is brought by an assignor, the complaint must show that the action is prosecuted for the benefit of the assignee.[2]

Where the complaint avers the assignment of the claim to the plaintiff before the commencement of the action, but fails to aver that he was the owner thereof at the

17. Calloway v. Oro Mining Co., 5 Cal. App. 191, 89 Pac. 1070.

18. Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890 (holding that it is sufficient to state claim was assigned to plaintiff without stating it was in writing); King v. Felton, 63 Cal. 66; Stearns v. Martin, 4 Cal. 227; Lapique v. Denis, 23 Cal. App. 683, 139 Pac. 237.

19. Stearns v. Martin, 4 Cal. 227.

20. Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517 (informal and argumentative allegation held sufficient in absence of objection by special demurrer); Krieger v. Feeny, 14 Cal. App. 538, 112 Pac. 901; Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904; Union Collection Co. v. National Fertilizer Co., 7 Cal. Unrep. 244, 82 Pac. 1129.

1. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423 (holding that the lack of an allegation of consent of the debtor to a partial assignment is cured by failure to object by special demurrer on the ground of want of parties).

2. Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

time of the commencement, such a pleading while perhaps insufficient to withstand the attack of a special demurrer is good as against a general demurrer, if, by fair implication, it appears from the complaint that the plaintiff claimed ownership at the time of the commencement of the action.[3]

Means or manner of assignment.—In accordance with the rule of pleading that only material allegations should be alleged, it is not ordinarily essential to the validity of a complaint to describe the manner of the assignment.[4] And it has been held that an equitable assignee need not allege the facts concerning an assignment in an action for money had and received of the assignor, who had notice of the assignment.[5]

§ 47. Answer and Defenses.—A general denial to an unverified complaint puts in issue only the fact of the indebtedness and the assignment to the plaintiff.[6] Hence, it does not put in issue the capacity of the assignee to sue,[7] or fraud in the assignment.[8] A denial upon information and belief of the allegation of an assignment is sufficient to raise an issue as to the fact of the assignment,[9] or as to the indebtedness.[10]

Pursuant to the rule that an answer which raises an issue on immaterial matters only presents no defense, it has been held that an answer constitutes no defense to

3. Irish v. Sunderhaus, 122 Cal. 308, 54 Pac. 1113; Golden v. Fischer, 27 Cal. App. 271, 149 Pac. 797; Krieger v. Feeny, 14 Cal. App. 538, 112 Pac. 901.

4. Cortelyou v. Jones, 132 Cal. 131, 64 Pac. 119; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Dambmann v. White, 48 Cal. 439; Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091 (where assignment must be in writing, it will be presumed as against a general demurrer that such was the case).

5. Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149.

6. Brown v. Curtis, 128 Cal. 193, 60 Pac. 773; McKiernan v. Lenzen, 56 Cal. 61.

7. Brown v. Curtis, 128 Cal. 193, 60 Pac. 773.

8. McKiernan v. Lenzen, 56 Cal. 61.

9. Read v. Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555.

10. Brady v. Ranch Mining Co., 7 Cal. App. 182, 94 Pac. 85.

an action on an assigned claim which alleges that the claim was not assigned to the plaintiff until after the time alleged in the complaint,[11] or that it was assigned for collection only,[12] or that no consideration was paid therefor,[13] or that it was assigned by one partner for a nominal consideration without consulting his copartner.[14] And an answer which does not directly deny an allegation of delivery of an assignment but alleges it was conditional presents no defense.[15] Neither will the debtor be permitted to set up the plea of ultra vires as applied to the right of the assignee to receive the assignment.[16] In an action upon a judgment by an assignee thereof, where the complaint alleges an assignment of a judgment, and also alleges that plaintiff is now the owner and holder of the judgment, the latter allegation is of a mere legal conclusion or presumption from the fact or assignment, and is unnecessary; and an answer denying each allegation presents an issue only as to the fact of the assignment.[16a]

The debtor may of course set up all defenses and equities against the assignor in an action brought by an assignee upon a non-negotiable chose in action.[17] But where a matter of counterclaim or setoff is pleaded, it must appear that it arose before the assignment or before the defendant had notice thereof.[18] Under the rule that new matter in the answer is deemed controverted, plaintiff may prove a countervailing debt of the debtor to the as-

11. Caulfield v. Sanders, 17 Cal. 569.

12. Kelley v. Hampton, 22 Cal. App. 68, 133 Pac. 339; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913.

13. Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231.

14. Caulfield v. Sanders, 17 Cal. 569.

15. Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156 (assignment of certificate of purchase of state school warrants).

16. Savings Bank of San Diego County v. Barrett, 126 Cal. 413, 58 Pac. 914; Ingle Mfg. Co. v. Scales, 36 Cal. App. 410, 172 Pac. 169.

16a. Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962.

17. Code Civ. Proc., § 368. See supra, § 37; Davis v. Rawhide Gold Min. Co., 15 Cal. App. 108, 113 Pac. 898.

18. Benham v. Connor, 113 Cal. 168, 45 Pac. 258.

signor as a setoff to an offset claimed by the debtor against the assignor that was unknown to plaintiff before answer.[19]

Evidence, Trial and Judgment.

§ 48. Evidence in General.—Where an assignment is a fact at issue, the proof thereof is as essential as that of the indebtedness.[20] As to the fact of an assignment, only evidence is admissible which is relevant and tends to prove the issues raised by the pleadings;[1] while evidence which is not relevant to the proof of such issues is not material and hence not admissible.[2] Accordingly, as proof of the fact of an assignment, it is competent and admissible to prove performance of the terms of an agreement by the assignee with the consent and knowledge of the assignor;[3] or the delivery of an instrument of an assignment to the assignee;[4] or its possession by the assignee;[5] or a previous pledge of the fund.[6] An assign-

19. Davis v. Rawhide Gold Min. Co., 15 Cal. App. 108, 113 Pac. 898.

20. Brown v. Curtis, 128 Cal. 193, 60 Pac. 773; Calloway v. Oro Min. Co., 5 Cal. App. 191, 89 Pac. 1070.

1. Bauer v. State, 144 Cal. 740, 78 Pac. 280 (holding that proof of the execution of an assignment is not limited to the testimony of one who actually saw it signed); Leitch v. Marx, 21 Cal. App. 208, 131 Pac. 328; Linder Hardware Co. v. Pacific Sugar Corp., 17 Cal. App. 81, 118 Pac. 785, 789; Calloway v. Oro Mining Co., 5 Cal. App. 191, 89 Pac. 1070.

2. Calloway v. Oro Min. Co., 5 Cal. App. 191, 89 Pac. 1070.

3. Humboldt Milling Co. v. Northwestern Pac. R. Co., 166 Cal. 175, 135 Pac. 503.

4. Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961; McCloskey v. Tierney, 141 Cal. 101, 99 Am. St. Rep. 33, 74 Pac. 699; Ferguson v. McBean, 4 Cal. Unrep. 429, 35 Pac. 559 (holding that the possession and production of an assignment by a third person is competent evidence to show he was the agent of the assignee).

5. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462 (rule applied to assignment of an invalid obligation admitted to prove assignment, but not the fact of indebtedness); Hutchings v. Castle, 48 Cal. 152; Linder Hardware Co. v. Pacific Sugar Corp., 17 Cal. App. 81, 118 Pac. 785, 789 (holding that where a note payable to a corporation was indorsed in the name of the corporation by its treasurer, and its assignment was denied in the answer, that its possession by the plaintiff at the trial, and its introduction in evidence by him, was properly allowed.

6. McEwen v. Johnson, 7 Cal. 258.

ment may be proved by parol testimony, except where the transfer is required by statute to be in writing.[7] Upon proof of its execution, an assignment is admissible in evidence.[7a] And an assignment to which a corporate seal, or a notarial certificate of acknowledgment, of the assignor is affixed, is entitled to be admitted as prima facie evidence of the transfer.[8]

The circumstances under which an assignment is executed are admissible as evidence of an intent to make it.[9] And so it has been held that it is not necessary that an intention to make an order on a fund operate as an equitable assignment should appear on the face of the order.[10]

Declarations of assignor:—The statements or acts of an assignor subsequently made or performed after the assignment and transfer have no effect as against the assignee as tending to overcome his proof of transfer.[11] Thus, the title of an assignee as owner and holder of an assigned note and mortgage cannot be defeated by recitals in a subsequent assignment from the assignor to another

7. Humboldt Milling Co. v. Northwestern Pac. Ry. Co., 166 Cal. 175, 135 Pac. 503; Joyce v. Wing Yet Lung, 87 Cal. 424, 25 Pac. 545 (rule applied verbal acceptance of order on fund); Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231. See supra, § 20, as to assignments required to be in writing.

7a. Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962.

8. Anderson v. Wickliffe, 178 Cal. 120, 172 Pac. 381; Thomas v. Fursman, 177 Cal. 550, 171 Pac. 301. See Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961 (stating that the admission in evidence of an assignment purporting to have been executed by an attorney in fact of the assignor without first proving the authority of such attorney will be deemed without injury where no specific objection was made predicated upon the absence of such proof, and it appeared that the assignment had been executed and acknowledged in due form before a notary public).

9. McCloskey v. Tiernay, 141 Cal. 101, 99 Am. St. Rep. 33, 74 Pac. 699; Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820. And cases cited infra.

10. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462; Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517; John M. C. Marble Co. v. Merchants' Nat. Bank of Los Angeles, 15 Cal. App. 347, 115 Pac. 59; Brady v. Ranch Mining Co., 7 Cal. App. 182, 94 Pac. 85.

11. Mushet v. Fox, 6 Cal. App. 77, 91 Pac. 534.

assignee to the effect that the notes and mortgages were held merely as security for an indebtedness.[12] But evidence of statements of an assignor against his interest is admissible in a suit by the assignee on an assigned claim.[13] And it has been held that a resolution of the directors of a corporation substituting plaintiff as assignee, pursuant to power of attorney, is admissible as evidence of the assignment.[14]

§ 49. Sufficiency of Proof.—Pursuant to the rule that a fact must be proved by satisfactory evidence,[15] it has been held that an assignment was not sufficiently proved by evidence that at a meeting of several claimants against the defendant, it was agreed that claimants should present their claims, and plaintiff subsequently sued as assignee of such claims.[16] And where there is nothing to show that defendants, or either of them, dealt with or recognized the plaintiff as assignee, evidence that plaintiff made demand of defendants and that defendants received notice from the original owner of the claim that he had assigned the claim to the plaintiff has been held insufficient as proof of an assignment to overcome the denial thereof.[17] The certificate of a notary to an acknowledgment of a written assignment is prima facie proof of the execution and delivery thereof.[18] And the delivery of a written assignment is sufficiently established by its production at the trial by the assignee.[19] It has been

12. Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

13. Bollinger v. Bollinger, 153 Cal. 190, 94 Pac. 770.

14. Bauer v. State, 144 Cal. 740, 78 Pac. 280.

15. Code Civ. Proc., §§ 1826, 1835. See EVIDENCE.

16. Gustafson v. Stockton etc. R. Co., 132 Cal. 619, 64 Pac. 995.

17. Brown v. Curtis, 128 Cal. 193, 60 Pac. 773.

18. Code Civ. Proc., § 1948; Thomas v. Fursman, 177 Cal. 550, 171 Pac. 301. See ACKNOWLEDGMENTS, vol. 1, p. 231.

19. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

held that an assignment of a claim by a partnership for rent due under a lease is sufficiently proven by the testimony of one of the partners that before the commencement of the action he assigned in writing on the back of the lease all the claims of himself and his partner to all the rent due from the defendant.[20]

§ 50. Burden of Proof.—Where the fact of an assignment is put in issue, the burden of proving it is upon the assignee.[1] And it must be proved and is to be determined by the preponderance of evidence, as in other issues.[2] A party seeking to avoid an assignment for want of consideration, however, has the burden of proof.[3] And a debtor has the burden of establishing payment of an assigned claim.[4] Where a claim which has been assigned to a party defendant in an action and paid by him is offered as an offset against the demands of the plaintiff, the burden of the proof as to settlement of the claim by plaintiff rests upon the plaintiff.[5] And in a case where an assignment of accounts is made by a corporation reserving a right to collect a certain sum to use in its business, the burden of proof is upon a subsequent assignee of the corporation with notice of the rights of the prior assignee to show that the corporation had not collected the sum reserved.[6]

20. Duncan v. Tom Poste, Inc., 36 Cal. App. 370, 172 Pac. 163.

1. Nakagawa v. Okamoto, 164 Cal. 718, 130 Pac. 707; Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162; Brown v. Curtis, 128 Cal. 193, 60 Pac. 773; Ford v. Bushard, 116 Cal. 273, 48 Pac. 119; Read v. Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; Calloway v. Oro Min. Co., 5 Cal. App. 191, 89 Pac. 1070.

2. Ford v. Bushard, 116 Cal. 273, 48 Pac. 119.

3. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820.

4. Caulfield v. Sanders, 17 Cal. 569. See Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746 (holding that the assignee of a check issued for an illegal consideration and assigned before its dishonor has the burden of proving that he took it for value and without notice). See PAYMENT.

5. Saxton v. Kneeland, 45 Cal. 116.

6. Works v. Merritt, 105 Cal. 467, 38 Pac. 1109.

§ 51. Presumptions.—An acknowledgment and attestation before a notary of a written assignment is held to be prima facie proof of its execution and delivery.[7] And an assignment to which a corporate seal is affixed makes a prima facie showing that the officer executing the paper had due authority to execute it, and hence is entitled to be admitted as evidence.[8] The holder of an assigned nonnegotiable contract is presumptively the owner thereof.[9] And an assignment in writing is presumed to be supported by a sufficient consideration.[10] In those instances where a writing is necessary to the validity of an assignment and the assignment is alleged as a fact in the complaint, it will be presumed on appeal in support of the complaint that the assignment was in writing.[11] And it will be presumed that an assignment had been delivered at the date of its execution.[12]

§ 52. Parol Evidence Rule.—Assignments are of course subject to the cardinal rule of evidence that the terms of a written instrument cannot be varied or altered by evidence resting in parol.[13] Thus, parol evidence is not admissible to alter or vary the terms of an assignment by showing that a written assignment made to one assignee was in fact to two jointly, when each was known to the assignor;[14] or that the contract assigned was the

7. Thomas v. Fursman, 177 Cal. 550, 171 Pac. 301 (pursuant to Code Civ. Proc., § 1948). See ACKNOWLEDGMENTS, vol. 1, p. 231.

8. Anderson v. Wickliffe, 178 Cal. 120, 172 Pac. 381; Watkins v. Glas, 5 Cal. App. 68, 89 Pac. 840.

9. Lucas v. Pico, 55 Cal. 126.

10. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746. See Civ. Code, §§ 1614, 1615.

11. Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890.

12. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

13. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Owen v. Meade, 104 Cal. 179, 37 Pac. 923; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156; Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904. See EVIDENCE.

14. Ferguson v. McBean, 91 Cal. 63, 14 L. R. A. 65, 27 Pac. 518.

property of a third person other than assignor;[15] or that the assignee was not to record the instrument of assignment until after the death of the assignor;[16] or that an assignment which was absolute on its face was conditionally delivered.[17] Nor is parol evidence almissible to show that an instrument which was in form a bill of exchange was in effect to operate as an equitable assignment.[18] But parol evidence is admissible to prove that an assignment absolute on its face was intended to operate only as a mortgage,[19] or to explain an ambiguity in an assignment,[20] or an obvious omission therein.[1] The rule excluding parol evidence to explain, vary or contradict the terms of a written contract does not apply where both of the parties to the action are not parties or privies to the assignment, and the question arises only between the plaintiff and his assignor who is not a party to the action.[2] Where a novation is effected by the assignment and the agreement of the parties, it may be proved by parol without violating the rule.[3]

§ 53. Findings.—Conformably to the principles of the law, a general finding that all the allegations of plain-

15. Ferguson v. McBean, 91 Cal. 63, 14 L. R. A. 65, 27 Pac. 518.

16. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

17. Burkett v. Doty, 176 Cal. 89, 167 Pac. 518; affirming Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042; Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156.

18. Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283.

19. Golden v. Fischer, 27 Cal. App. 271, 149 Pac. 797 (assignment of stock).

20. Culver v. Newhart, 18 Cal. App. 614, 123 Pac. 975 (parol evidence held admissible to show a specific account was included in a bill of sale of personal property, and "accounts and indebtedness").

1. Owen v. Meade, 104 Cal. 179, 37 Pac. 923 (rule applied to admission of evidence where name of assignee was omitted entirely).

2. Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904 (holding that assignee in action against the debtor is permitted to show by parol evidence that his initials were transposed by mistake in a written assignment; also, that the opinion evidence of a husband of an assignor as to the person to whom his wife intended to execute the assignment is not admissible).

3. Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979.

tiff's complaint are true is a sufficient finding of an assignment, and hence it is not necessary to find specially on this subject.[4] And findings which find facts sufficient to support a conclusion are sufficient although they omit to find upon the conclusion.[5]

Findings are to be disregarded where they are made upon evidence outside of the issues,[6] or where they are not supported by the evidence.[7] And a finding which is in fact a mere conclusion of law, which is not within any issues made by the pleadings, and which is contradicted by other findings, cannot be sustained.[8]

While a defendant is entitled to a finding upon an affirmative defense where evidence is offered in support thereof, yet if it appears from the record that the failure to make such finding would not support the substantial rights of the appellant, the judgment ought not to be reversed. Thus it was held that a debtor is not prejudiced by an omission to find upon his plea of want of

4. Young v. Clark, 7 Cal. App. 194, 93 Pac. 1056; Lynip v. Alturas School District, 24 Cal. App. 426, 141 Pac. 835 (holding that a finding by the court that "all the allegations of the said complaint are true," constitutes a finding that the assignment as set out in haec verba in the complaint, was not only executed but that its terms as so set out are true).

5. Estate of Wickersham, 153 Cal. 603, 96 Pac. 311 (rule applied to facts showing adequacy of consideration received by an heir for assignment of his expectancy).

6. Calloway v. Oro Mining Co., 5 Cal. App. 191, 89 Pac. 1070 (holding that a finding of an assignment is not sustained merely by evidence that the debtor promised to pay the assignor for work done for another if the assignor would continue to work for the debtor).

7. McKiernan v. Lenzen, 56 Cal. 61 (finding as to fraud where not in issue). A judgment based upon findings which are contrary to the evidence must be set aside. Thomas v. Fursman, 177 Cal. 550, 171 Pac. 301. See JUDGMENTS. But a finding that a claim was assigned for collection only is sufficient to support a judgment. Kelley v. Hampton, 22 Cal. App. 68, 133 Pac. 339.

8. Lynip v. Alturas School Dist., 24 Cal. App. 426, 141 Pac. 835; Lynip v. Alturas School District, 24 Cal. App. 426, 141 Pac. 835 (holding that a finding "that there is now due, owing and unpaid to the plaintiff from defendant on account of the money loaned and advanced by him," considered in the light of the complaint, is a conclusion of law).

consideration, where the consideration was proved by the assignee.[9]

§ 54. Judgment.—A judgment in favor of the assignee operates as an estoppel upon the assignor to the same extent as though it had been recovered by him.[10] But the claimant of the proceeds of a judgment, under the rightful owner, is not estopped by such a judgment under an invalid assignment unless it is shown that the fact of the assignment was put in issue between the debtor and the alleged assignee.[11] Unless the statute provides that the particular assignment shall be in writing, it is not necessary to support a judgment for the plaintiff (assignee) that the complaint should specifically allege, or that the findings should show, that the assignment of the claim on which the lien is based was in writing. In such a case an allegation and finding that the claim was assigned to the plaintiff is sufficient.[12] Where the answer presented an issue as to the assignment of defendant's indebtedness from the assignor to the assignee (plaintiff), it must be presumed upon appeal in support of the judgment that the fact of such assignment was litigated upon the trial and that the case was treated by the parties as involving that issue.[13]

9. Mushet v. Fox, 6 Cal. App. 77, 91 Pac. 534.

10. Wetmore v. City and County of San Francisco, 44 Cal. 294. See JUDGMENTS.

11. Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 435.

12. Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890. See supra, § 46, as to allegation of an assignment in a complaint, sufficient to support a judgment in favor of the assignee.

13. Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517.

(G. R. B.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. Introductory—Scope of Article.
2. Characteristics and Distinctions.
3. Outline of California Law.
4. Who may Assign.
5. Effect on Title to Property.
6. Formal Requisites and Validity in General.
7. Necessity for Inventory.
8. Acknowledging and Recording.
9. Preferences.
10. Powers of Assignee.
11. Duties and Liabilities of Assignee.
12. Compensation of Assignee.
13. Rights of Creditors in General.
14. Right to Attack Assignment.

§ 1. Introductory—Scope of Article.—The passage of the federal Bankruptcy Act[1] has undoubtedly had the effect of decreasing the frequency with which assignments are made by debtors for the benefit of their creditors. This enactment, however, does not entirely supersede the state laws relating to such assignments, and they may properly be made either under the common law or under state statutes, providing they do not run counter to the national act.[2] Such a condition of the law warrants a general discussion of the principles governing the making, within the state, of assignments for the benefit of credi-

1. Act July 1, 1898, c. 541; 30 Stats. at Large, 544; 1 Fed. Stats. Ann., 2d ed., 504. See BANKRUPTCY.

2. Boese v. King, 108 U. S. 379, 27 L. Ed. 760, 2 Sup. Ct. Rep. 765, see, also, Rose's U. S. Notes; Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377, see, also, Rose's U. S. Notes.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 194 Pac.

tors. This article will be confined to a consideration of voluntary assignments wherein the property of the assignor is placed in the hands of a third party by his own act. Involuntary assignments whereby the property is placed in the hands of a third party by operation of law, without the act of the debtor and against his consent, are treated elsewhere.[3]

§ 2. Characteristics and Distinctions.—The statutes on the subject attempt no definition of assignments for the benefit of creditors;[4] but there are qualities which, when appearing in an instrument of transfer, characterize it as among those required to conform to the statute or else be treated as void as to creditors.[5] The material and essential characteristic of a general assignment for the benefit of creditors is the presence of a trust.[6] However, it is clear that not every transfer of property in trust for the benefit of creditors is an assignment within the meaning of the statute. For example, a conveyance in trust whereby the trustor reserves an interest in the property itself is not such an assignment.[7] But a conveyance to trustees for the benefit of creditors is not prevented from being a valid assignment by the fact that the instrument provides that the surplus, if any, shall be returned to the assignor.[8] A mere transfer of property cannot be construed to be an assignment for the benefit

3. See INSOLVENCY.

4. Civ. Code, §§ 3449–3473.

5. Sabichi v. Chase, 108 Cal. 81, 41 Pac. 29.

6. Sabichi v. Chase, 108 Cal. 81, 41 Pac. 29; Wellington v. Sedgwick, 12 Cal. 469; Dana v. Stanford, 10 Cal. 269.

7. Civ. Code, § 3457, subd. 4; Heath v. Wilson, 139 Cal. 362, 73 Pac. 182 (citing Reagan v. Aiken, 138 U. S. 109, 34 L. Ed. 892, 11 Sup. Ct. Rep. 283; Lawrence v. Neff, 41 Cal. 566). See infra, this section, as to assignment for benefit of creditors distinguished from transfer by way of security.

8. Civ. Code, § 3457, subd. 4, provides that assignment is void where the assignor reserves any interest in the assigned property "before all his existing debts are paid"; Heath v. Wilson, 139 Cal. 362, 73 Pac. 182; Sabichi v. Chase, 108 Cal. 81, 41 Pac. 29.

of creditors,[9] even though made in consideration of a promise to pay a debt of the grantor.[10]

Distinguished from transfer by way of security.—The distinction between assignments for the benefit of creditors and transfers by way of security is well defined. If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it, and if it is intended as an absolute conveyance of all of his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, or a portion of them, in legal effect it is an assignment for the benefit of creditors, no matter what name or designation the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance is not an assignment for the benefit of creditors, but will be treated as transfer by way of security, or a mortgage, though the debtor is insolvent at the time and it covers all his property and but a portion of his debts are secured by it.[11]

§ 3. Outline of California Law.—Common-law assignments for the benefit of creditors were long looked upon by the courts with disfavor as a fruitful source of fraud and litigation. They were generally made purely for the benefit of the assignor, and in evasion of legal processes.[12] In 1852 the legislature passed an insolvent law[13] which had the effect of invalidating voluntary assignments by insolvents for the benefit of their creditors, whether gen-

9. Tuers v. Tuers, 131 Cal. 625, 63 Pac. 1008.

10. Saunderson v. Broadwell, 82 Cal. 132, 23 Pac. 86; Parkinson Bros. Co. v. Figel, 24 Cal. App. 701, 142 Pac. 135.

11. Heath v. Wilson, 139 Cal. 362, 73 Pac. 182; Sabichi v. Chase, 108 Cal. 81, 41 Pac. 29; Wood v. Franks, 67 Cal. 32, 7 Pac. 50; Dana v. Stanford, 10 Cal. 269.

12. Dana v. Stanford, 10 Cal. 269; Chever v. Hays, 3 Cal. 471.

13. Stats. 1852, p. 69, § 39.

eral[14] or partial.[15] This statute was superseded in so far as it affected assignments by insolvents for the benefit of creditors, by the enactment of the code of 1872, which contained provisions authorizing such assignments provided certain requirements were observed.[16] The act of 1872 has not been repealed by insolvent laws subsequently passed, and except as amended, it remains in force.[17] In operation, the laws of the state, in relation to assignments for the benefit of creditors, apply to all persons and property within its jurisdiction, but not to persons and property in a foreign jurisdiction or to assignments made in foreign jurisdictions in cases where no rights of any of its citizens are involved.[18] Such laws do not prevent a debtor, admittedly insolvent, from transferring his property directly to his creditor either absolutely in payment of his debts or as security by way of mortgage.[19] And an insolvent debtor has the right to pay off any creditor if he desires to do so, though he may intend at the time to make an assignment.[20] Nor do such laws preclude an insolvent debtor who has executed a valid assignment from applying for and receiving a discharge under the insolvency law.[1]

§ 4. Who may Assign.—Under the law of California,[2] any insolvent may, in good faith, make an assignment for the benefit of his creditors, with or without the consent of the latter, and when such an assignment is made, the

14. Dana v. Stanford, 10 Cal. 269; Groschen v. Page, 6 Cal. 138; Chever v. Hays, 3 Cal. 471.

15. Groschen v. Page, 6 Cal. 138.

16. See title III, pt. II, div. IV, "Assignments for the Benefit of Creditors," Civ. Code, §§ 3449–3473, inclusive.

17. Barroilhet v. Fisch, 63 Cal. 462; Dresbach v. His Creditors, 63 Cal. 187; Hecht v. Green, 61 Cal. 269.

18. Fenton v. Edwards, 126 Cal. 43, 77 Am. St. Rep. 141, 46 L. R. A. 852, 58 Pac. 320 (citing Civ. Code, § 3451).

19. Wood v. Franks, 67 Cal. 32, 7 Pac. 50. See BANKRUPTCY.

20. In re Luce, 83 Cal. 303, 23 Pac. 350.

1. Dresbach v. His Creditors, 63 Cal. 187.

2. Civ. Code, §§ 3449–3473.

creditors must either avail themselves of the assets without preference or not at all.[3] The object of the law is to enable an insolvent debtor, through his assignee, to dispose of his property for the benefit of his creditors. It is clear that this object would be defeated if one of the creditors could ignore the assignment, and sell the property to satisfy his particular claim.[4] The right of an insolvent debtor to make such an assignment is subject, however, to statutory provisions relative to trusts and fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, or by corporations, or by other specific classes or persons.[5] A debtor is insolvent, within the contemplation of the law, when he is unable to pay his debts from his own means as they fall due.[6]

Partnerships.—It is well recognized that partners may make a valid assignment of the partnership's property for the benefit of the firm creditors.[7] And one partner of a firm, expressly or by implication, sole manager, may assign the firm property in trust for the benefit of creditors, if the assignment is necessary for their protection.[8] An assignment in trust for the benefit of each and all the creditors of a firm is sufficiently specific. When an assignment embraces individual as well as partnership property, it must be construed so as to give individual property to individual creditors, and firm property to firm creditors.[9]

Corporations.—A corporation has a right to make an assignment in trust for its creditors, and may exercise

3. Civ. Code, § 3457; Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac. 675.

4. Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac. 675.

5. See infra, § 14, as to right to attack assignment when made in contravention of the statute.

6. Civ. Code, § 3450.

7. O'Kane v. Hyde, 70 Cal. 6, 12 Pac. 124; Forbes v. Scannell, 13 Cal. 242, affirming, 1 Lab. 132.

8. Civ. Code, § 2430; Forbes v. Scannell, 13 Cal. 242, affirming 1 Lab. 132 (quoting from Parsons on Mercantile Law and Partnership).

9. Forbes v. Scannell, 13 Cal. 242; affirming 1 Lab. 132.

that right to the same extent as a natural person, unless restricted by its charter or by some statutory provision.[10] And this right extends to foreign as well as to domestic corporations. It has been held that notice of the assignment for the benefit of the creditors of a foreign corporation need not be given to debtors of the assignor residing in this state prior to the service upon them of an attachment at the suit of a creditor of the assignor; but it is sufficient if the debtors receive notice subsequently thereto in time to avail themselves of the assignment to defeat the claim of the attaching creditor against them.[11]

§ 5. Effect on Title to Property.—A valid deed of assignment for the benefit of creditors operates to divest the assignor of his entire interest and estate in the property assigned, and to vest the same in the assignees subject to the rights of the assignor to a reconveyance of any residue remaining undisposed of after the creditors are satisfied, or to the payment of the surplus proceeds of sales of the property.[12] But the assignment is not subject to the rights of the creditors afterward acquired against the assignor;[13] and it affects only the property of the assignor mentioned therein. Neither the creditors nor assignees can claim any property under an assignment for the benefit of creditors which is not in fact deeded to them.[14] It has been provided by the Civil Code that property exempt from execution, and insurance upon the life of the assignor do not pass to the assignee unless the

10. Bank of Visalia v. Dillonwood etc. Co., 148 Cal. 18, 82 Pac. 374; Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30 (under statute of April 23, 1880, providing for assignments for the benefit of the creditors of mining corporations).

11. Fenton v. Edwards, 126 Cal. 43, 77 Am. St. Rep. 141, 46 L. R. A. 852, 58 Pac 320.

12. Wilhoit v Cunningham, 87 Cal. 453, 25 Pac. 675.

13. Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30; Hecht v. Green, 61 Cal. 269; Handley v. Pfeister, 39 Cal. 283, 2 Am. Rep. 449.

14. Wilhoit v. Bryant, 78 Cal. 263, 20 Pac. 561.

instrument specially mentions them, and declares an intention that they should pass thereby.[15] Pursuant to the general rule that a contract, valid by the law of the place where it is made, is valid everywhere, a voluntary or common-law assignment made in the state of a foreign assignor's domicile will be respected in so far as it is not in conflict with the laws or public policy of the state, and consequently will, as against subsequent attaching creditors, pass the title to real or personal property of the assignor situated in this state.[16]

Prior equitable liens or rights.—The effect of an assignment as against the holders of prior equitable liens or rights has been summarized as follows:

"It seems to be the general and accepted rule that the assignee of a voluntary assignment for the benefit of creditors stands in no better situation than the assignor. Neither he nor the creditors whom he represents are purchasers for a valuable consideration without notice as against prior equitable liens. This being so, it follows, generally speaking, that a trustee claiming under a conveyance made to him, for the benefit of creditors, takes the property at the time of the execution of the conveyance subject to every equity which might then have been enforced against it in the hands of the debtor. But this general rule is subject to the exception that an assignment for the benefit of creditors and a conveyance made thereunder executed prior to any endeavor on the part of the vendor to declare and establish his lien will prevail over and operate to defeat the right to claim the lien where the creditors become subscribing parties to the assignment and thereby accept the same by assenting to and claiming the benefits of its provisions. The reason for this exception to the rule is based upon the theory that general creditors are not transformed into encumbrancers in good faith and for value by the debtor's mere voluntary assignment of his property for their benefit, because it still remains for the creditors to exercise the option

15. Civ. Code, § 3470.

16. Fenton v. Edwards, 126 Cal. 43, 77 Am. St. Rep. 141, 46 L. R. A. 852, 58 Pac. 320; Forbes v. Scannell, 13 Cal. 242, affirming 1 Lab. 132.

which they have either of accepting or rejecting the assignment, and until they have elected to take under the deed the assignee is rather the trustee for the debtor than for them."[17]

§ 6. Formal Requisites and Validity in General.— Under the common law it was not necessary to observe any particular formalities in the execution of an assignment for the benefit of creditors.[18] By statute, however, certain formal requisites have been prescribed. The assignment must be in writing, subscribed by the assignor or his agent thereto authorized in writing;[19] and it must contain an inventory showing the names of the creditors of the assignor and the nature of their claims.[20] Following its execution it must be delivered to the sheriff, who in turn must transfer it to the assignee selected by the creditors in accordance with the code provisions.[1] By the assignment, the assignor may provide for any subsisting liability which he might lawfully pay, whether absolute or contingent.[2]

A delivery of the property is not essential to validity of an assignment;[3] nor is it essential to the validity of the instrument itself that the assignee give the bond required by section 3467 of the Civil Code,[4] though of course, the giving of such bond is necessary to validate the acts of the assignee.[5] Once properly executed, an

17. Ferger v. Allen, 35 Cal. App. 738, 170 Pac. 861 (per Lennon, P. J.).

18. Forbes v. Scannell, 13 Cal. 242, affirming 1 Lab. 132.

19. Civ. Code, §§ 3458–3459. See Lockwood v. Canfield, 20 Cal. 126 (holding that parol evidence is admissible to prove that a written assignment of personal property, absolute upon its face, was in fact made in trust for the benefit of creditors).

20. See infra, § 7, as to inventory.

1. Civ. Code, § 3449 et seq.

2. Civ. Code, § 3452.

3. Garn v. Thorwaldson, 40 Cal. App. 62, 180 Pac. 9 (construing section 3440 of the Civil Code).

4. Civ. Code, § 3467; Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325; Bryant v. Langford, 80 Cal. 542, 22 Pac. 219.

5. Civ. Code, § 3468.

assignment can be modified only with the assent of the creditors and assignor.[6]

When void.—Under the code, an assignment is void against any creditor of the assignor not assenting thereto if it gives certain preferences;[7] or if the elements of coercion or fraud are present;[8] or if it gives the assignee unnecessary powers, or exempts him from liability for neglect of duty or misconduct;[9] or if it reserves any interest in the assigned property or in any part thereof to the assignor or for his benefit before all his existing debts are paid.[10]

An assignment which is conclusively shown to have been made with intent to hinder, delay and defraud creditors is void at common law as well as under the code.[11] The word "void" as applied to assignments in the Civil Code is used by the legislature in its ordinary sense, i. e., that the assignment is ineffectual for the purposes, or for a part of the purposes intended.[12]

§ 7. Necessity for Inventory.—The statute provides that the debtor must file an inventory showing all the creditors of the assignor, and containing a list of all his property of every kind whether exempt or not exempt from execution; and that unless such an inventory or a specified substitute is filed, the assignment is void.[13] Hence, under the statute, if the debtor in bad faith omits some of his debts and property from the inventory, the assignment is void,[14] and the right of his creditors to proceed against him is in no way impaired.[15] But a mis-

6. Civ. Code, § 3473.
7. See infra, § 9.
8. See infra, § 14.
9. See infra, § 10.
10. See supra, § 2.
11. In re Donald Beadle, 5 Sawy. (U. S.) 351, Fed. Cas. No. 1155.
12. Watkins v. Wilhoit, 4 Cal. Unrep. 450, 35 Pac. 646.
13. Civ. Code, §§ 3461–3462, 3465.
14. Beardsley v. Frame, 85 Cal. 134, 24 Pac. 820; Aylesworth v. Dean, 2 Cal. Unrep. 696, 12 Pac. 241.
15. Wilhoit v. Bryant, 78 Cal. 263, 20 Pac. 561.

take in computation, or an unintentional error, whereby the indebtedness to some of the creditors is represented in the inventory as larger than the amounts actually owing, is not enough to vitiate the assignment.[16]

It is well settled that in the absence of statutory enactment a schedule of the property intended to be transferred, and of the creditors to be secured, is not a necessary part of an assignment for the benefit of creditors. And it has been held that the want of such a schedule, though sometimes regarded as a circumstance of fraud, will not of itself avoid the assignment.[17]

§ 8. Acknowledging and Recording.—With the object of protecting creditors and making assignments for their benefit public and irrevocable, the legislature has provided that such assignments must be acknowledged, or proved and certified, and recorded in the mode prescribed for recording transfers of real property.[18] Otherwise, it is declared, the assignment will be void "against creditors of the assignor and against purchasers and encumbrancers in good faith and for value."[19] However, it has been held that an assignment which falls short of these requirements is valid against the assignor and all creditors assenting to it, and serves to vest the assignor's title in the assignee; that at most it is void only against creditors not assenting thereto and against purchasers and encumbrancers in good faith and for value.[20] Section 3466 of the Civil Code provides that

"Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of article four of the chapter on recording transfers [Civil

16. Barroilhet v. Fisch, 63 Cal. 462.

17. Forbes v. Scannell, 13 Cal. 242.

18. Civ. Code, §§ 3458, 3463–3464.

19. Civ. Code, § 3465.

20. Garn v. Thorwaldson, 40 Cal. App. 62, 180 Pac. 9 (citing Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325, in which a similar conclusion was reached under section 3465 of the Civil Code as it stood prior to the amendment of 1889).

Code, sections 1213–1218], as well as to those of this title [Assignments for the Benefit of Creditors]."

This section has been construed to mean merely that to be effective against subsequent purchasers or mortgagees, an assignment for the benefit of creditors must be recorded in every county where any of the real property is situated, and it must be so recorded as to give them constructive notice. So far as creditors are concerned, the law is satisfied if the assignment is recorded in the county where the debtor resides. Furthermore, a deposit of the deed of assignment in the recorder's office with the proper officer for record is a sufficient recording under the Civil Code (section 1170). It is not invalidated by want of record in the proper book of records.[1]

§ 9. Preferences.—There is a settled rule that in the absence of statutes forbidding preferences, every debtor has a right to prefer one or more of his creditors to the rest, and he may do this in an assignment for the benefit of creditors as freely as in any other way.[2] However, under the policy adopted by the legislature, an assignment is void against any creditor of the assignor not consenting thereto "if it gives preference to one debt or class of debts over another";[3] or "if it tend to coerce any creditor to release or compromise his demand";[4] or "if it provide for the payment of any claim known to the assignor to be false or fraudulent; or for the payment of more upon any claim than is known to be justly due from the assignor."[5] Accordingly, an assignment for creditors by a

1. Watkins v. Wilhoit, 104 Cal. 395, 38 Pac. 53 (holding in department, 4 Cal. Unrep. 450, 35 Pac. 646, not sustained).

2. Heath v. Wilson, 139 Cal. 362, 73 Pac. 182; Lawrence v. Neff, 41 Cal. 566; Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449; Billings v. Billings, 2 Cal. 107, 56 Am. Dec. 319. See BANKRUPTCY.

3. Civ. Code, § 3457, subd. 1; Bank of Visalia v. Dillonwood etc. Co., 148 Cal. 18, 82 Pac. 374; Sabichi v. Chase, 108 Cal. 81, 41 Pac. 29.

4. Civ. Code, § 3457, subd. 2.

5. Civ. Code, § 3457, subd. 3.

partnership of individual as well as of partnership property is void as to nonassenting creditors, if a preference is given to the partnership creditors over the individual creditors, as to the individual property.[6]

However, certain preferences, depending upon the nature of the claims, are provided by law and are applicable to assignments for the benefit of creditors as well as to assignments generally. Under this rule, when any voluntary assignment is made for the benefit of creditors, the wages and salaries of those performing services for the assignor within a certain time prior to the assignment and not exceeding a certain amount constitute preferred claims, and must be paid by the assignee before the claim of any other creditor of the assignor.[7] It has been held, where a trust agreement provides a preference of persons performing labor and furnishing supplies thereunder, that they have a preference over all general creditors, including the claim of the trustee for salary and advances which accrued in his favor prior to the trust. And where the principal creditors agree to give the trustee a preference over themselves respecting his prior salary and advances, they can bind only themselves by such agreement.[8]

§ 10. Powers of Assignee.—An assignee for the benefit of creditors acquires, subject to the statutory restrictions, only those powers and rights in reference to the property assigned which are embraced in the instrument of assignment.[9] He is not to be regarded as a purchaser for value in respect to things in action transferred by the assignment, and has no greater rights than were possessed by

6. O'Kane v. Hyde, 70 Cal. 6, 12 Pac. 124.

7. Code Civ. Proc., § 1204; Bank of Visalia v. Dillonwood etc. Co., 148 Cal. 18, 82 Pac. 374.

8. Bank of Visalia v. Dillonwood etc. Co., 148 Cal. 18, 82 Pac. 374.

9. Bank of Visalia v. Dillonwood etc. Co., 148 Cal. 18, 82 Pac. 374 (holding that the authority of the assignee to mortgage trust property is confined to the terms of the trust agreement); Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495.

the debtor in respect thereto.[10] As has been pointed out, an assignment which gives the assignee any power which, if exercised, might delay the execution of the trust, is void.[11] But a deed of assignment giving assignees "a reasonable discretion" as to the making of sales of the assigned property must not be construed to be void, but only as conferring such discretion upon the assignee as he is authorized by law to exercise.[12] Until the required inventory and affidavit have been filed, and the required bond given, the assignee has no authority to dispose of the estate or convert it to the purpose of the trust.[13] But after they are filed, a sale by him of the assigned property will have the effect of transferring the title discharged from the trust,[14] and free from the claims of the creditors.[15] Losses to the trust estate caused by interference by the creditors with the assignee in his management thereof may be charged to those creditors who occasion such losses.[16]

Actions by assignee.—According to the accepted rule, an assignee has no right or power to maintain an action to recover property previously transferred by the debtor in fraud of his creditors, unless so authorized by statute.[17]

10. Civ. Code, § 3460.

11. Civ. Code, § 3457, subd. 4. See supra, § 6.

12. Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325.

13. Civ. Code, § 3468; Bryant v. Langford, 80 Cal. 542, 22 Pac. 219.

14. Campbell v. Sheldon, 1 Cal. Unrep. 546.

15. Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30.

16. Gschwend v. Estes, 51 Cal. 134.

17. First National Bank v. Menke, 128 Cal. 103, 60 Pac. 675; Ruggles v. Cannedy, 127 Cal. 290, 46 L. R. A. 371, 53 Pac. 911, 59 Pac. 827; Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495 (holding that an assignee for the benefit of creditors is not a person upon whom the assignor's estate has devolved within the meaning of section 3439 of the Civil Code which provides that "every transfer of property . . . with intent to delay or defraud any creditor . . . is void . . . against any person upon whom the estate devolves in trust for the benefit of others than the debtor). But see Ingram v. Smith, 83 Cal. 234, 33 Pac. 298 (holding that an assignee for the benefit of creditors might maintain a suit for the cancellation of a fraudulent note made by the assignor prior

This rule rests upon the ground that the assignee is merely the representative of his assignor, and does not represent the creditors.[18] The same principles apply where property has been pledged by the assignor prior to executing an assignment.[19] However, the assignee may protect property of which he has actually acquired possession against any false claim.[20] And he may maintain an action to quiet title to land against a subsequent execution purchaser.[1] Want of legal capacity of an assignee to sue, not appearing on the face of the complaint, is not a ground for demurrer, but can only be taken advantage of by answer.[2]

§ 11. Duties and Liabilities of Assignee.—An assignee under an assignment for the benefit of creditors takes title to the property as trustee, and in general his duties and liabilities are such as pertain to such office. He is bound to protect the assigned estate, and to administer it fairly and faithfully in the interests of the beneficiaries;[3] and he cannot, in his fiduciary capacity, make a profit inuring to himself out of the administration of the estate.[4] It is his duty to account to the proper court and persons,[5] even though the instrument creating the trust makes no provision for an accounting.[6] If the assignee under a

to the assignment on the ground that it was void against him within the meaning of section 3439 of the Civil Code).

18. First Nat. Bank v. Menke, 128 Cal. 103, 60 Pac. 675 (holding that the amendment of the Civil Code, section 3449, in 1899 did not change the face of the rule; and construing section 3439 of the Civil Code as applying only to assignments in insolvency and not to voluntary assignments for the benefit of creditors).

19. George v. Pierce, 123 Cal. 172, 55 Pac. 775.

20. Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495.

1. Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325.

2. Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac. 675.

3. Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495; Baker v. Bartol, 6 Cal. 483.

4. Sutliff v. Clunie, 4 Cal. Unrep. 697, 37 Pac. 224.

5. Civ. Code, § 3469.

6. Schneider v. Moncur, 30 Cal. App. 734, 159 Pac. 459; McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129.

fraudulent assignment, though innocent of fraud, has negligently permitted a misappropriation of the proceeds from a sale of the property, he is liable.[7] However, he is not to be held liable for his acts done in good faith in the execution of the trust merely for the reason that the assignment is afterward adjudged void.[8]

Actions by creditors.—It is a rule that where a person takes an assignment of personal property under an agreement with the assignor that out of the proceeds he will pay a debt due from the assignor to a third person, the assignee stands to the creditor in the relation of trustee, and is liable to a direct action by the creditor for the debt. In such case the proceeds are received to the use of the creditor, and the law creates the privity necessary to the maintenance of the action.[9] But when the claims of a creditor entitled to the benefit of an assignment have been satisfied according to the terms thereof, he has no further rights against the assignee. Thus, where a trustee to whom a debtor had assigned his property in trust to pay the proceeds pro rata to his creditors sold and assigned the property to a third person with notice of the trust, and such person converted the property into money and paid the creditors, it was held that the creditors had no cause of action against the trustee.[10] In an action by a creditor against another creditor who has been selected as assignee for the benefit of all the creditors for damages for breach of the trust agreement, the defendant, to be protected against personal actions against him by creditors other than the plaintiff for damages, is, notwithstanding that the action purports to be one in law for damages, entitled not only to an accounting of the trust property and funds, but also entitled to clear and specific findings,

7. Baker v. Bartol, 6 Cal. 483.

8. Civ. Code, § 3472.

9. Lockwood v. Canfield, 20 Cal. 126. See TRUSTS.

10. Sharp v. Goodwin, 51 Cal. 219.

and a judgment based thereon adjudicating the respective rights of all the creditors.[11]

§ 12. Compensation of Assignee.—Ordinarily, the deed of assignment fixes the compensation to which the assignee is entitled for his services. By statute he is entitled to the same commissions on assignments "as are allowed by law to the assignees in insolvency"; and in addition, he is entitled to "all necessary expenses in the management of the estate."[12] The assignee may recover his commissions even though the instrument of assignment is silent on the subject, and provides for the disposition of all the proceeds of the assigned property.[13] Where the services rendered by a trustee for the benefit of creditors are entirely different, both in extent and character, from the services contemplated by the parties at the time of the execution of the trust deeds, and there is no explicit provision therein as would make the stipulated compensation conclusive under the changed conditions, it has been held that a court of equity has the power to grant such increased compensation as would be reasonable.[14] It is proper for the court to limit the allowance of an agreed salary of the trustee under the trust for the conduct of the business to such time as he was engaged in the conduct thereof.[15]

Necessary expenses.—In addition to commissions, an assignee for the benefit of creditors is entitled to all necessary expenses in the management of the trust.[16] And in an action to obtain a decree settling the final accounts of a trustee for the benefit of the creditors, the court may make an allowance to him upon the settlement of their

11. Hotaling & Co. v. Hamilton, 36 Cal. App. 454, 172 Pac. 393.

12. Civ. Code, § 3471. See infra, this section, as to expenses.

13. Menke v. Miller, 56 Cal. 628, (construing Civ. Code, §§ 2274, 3471).

14. McDougal v. Fuller, 148 Cal. 521, 83 Pac. 701.

15. Bank of Visalia v. Dillonwood etc. Co., 148 Cal. 18, 82 Pac. 374.

16. Civ. Code, § 3471.

accounts for such further expenses and disbursements as might be incurred by him in closing the trust by complying with the terms of the judgment.[17] But an assignee is not entitled to counsel fees for setting up an unjust claim in his own behalf and against the estate, the decision being against him in the proceeding.[18] Where the court has made allowance to a trustee, it will be presumed upon appeal, in the absence of a showing in the record to the contrary, that the allowance was for all expenditures to which he was entitled.[19]

§ 13. Rights of Creditors in General.—In general, the rights of creditors under an assignment for their benefit are governed by the terms of the deed of assignment.[20] When there is nothing in the statute or in the assignment to the contrary, the creditors may sue on their claims after they have been filed and allowed, and may collect the judgment recovered out of any property not covered by the assignment, and such a suit cannot be considered as a repudiation or withdrawal of the claims. There is no inconsistency in the contemporaneous prosecution of the two remedies, unless there is an attempt to seize the assigned property on the execution. In fact, there may be very good reasons for such suit aside from the intention to repudiate or withdraw from the assignment proceedings,—as, for instance, to prevent the bar of the statute of limitations.[1] But a creditor who has assented to the assignment cannot seize or sell any of the assigned property on execution, though action had been commenced on his claims at the time of the assignment. Such a sale may be enjoined as casting a cloud upon the title of the assignee.[2] Money in the hands of an assignee, though

17. McDougal v. Fuller, 148 Cal. 521, 83 Pac. 701.

18. Sutliff v. Clunie, 4 Cal. Unrep. 697, 37 Pac. 224.

19. Bank of Visalia v. Dillonwood etc. Co., 148 Cal. 18, 82 Pac. 374.

20. Harrington v. Taylor, 176 Cal. 802, 169 Pac. 690.

1. Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30.

2. Wilhoit v. Cunningham, 87 Cal. 455, 25 Pac. 675.

held in trust for the creditors, is not a special deposit by or for them, and cannot be claimed by them jointly or severally as their personal property. And a delivery of the money into the custody of the court by the assignee will give the creditors no further rights until the rendering of a proper decree in regard to it.[3]

In the settlement of the accounts of trustees and the distribution of assets received by them, if the amount remaining is sufficient to pay the principal sum and only part of the interest, that available for the payment of interest should be paid proportionately according to the rate of interest to which each creditor is entitled, and it is error to distribute a like amount of interest to each creditor. If, however, the amount of interest of which the creditor is deprived by the adoption of the latter mode of distribution is too small to justify the reopening of the matter, the de minimis rule should be held to apply.[4] The rights of creditors under an assignment as against a mortgagee who has received possession of the assigned property from the assignee can be considered only in an action involving such rights to which the creditors are parties.[5]

Holders of negotiable instruments.—It has been provided by statute that where the drawee of a bill of exchange has made an assignment for the benefit of creditors, presentment for payment may be made to him or to his assignee.[6] And notice of dishonor of a negotiable instrument may be given either to the party himself or to his assignee.[7] Further, it has been provided that where the acceptor of a bill of exchange has made an assignment before the bill matures, the holder may cause

3. Dunsmoor v. Furstenfeldt, 88 Cal. 522, 22 Am. St. Rep. 331, 12 L. R. A. 508, 26 Pac. 518.

4. McDougal v. Fuller, 148 Cal. 521, 83 Pac. 701.

5. Adlard v. Rodgers, 105 Cal. 327, 38 Pac. 889.

6. Civ. Code, § 3226.

7. Civ. Code, § 3182.

the bill to be protested for better security against the drawers and indorsers.[8]

§ 14. Right to Attack Assignment.—The right of creditors to attack an assignment exists when it is void or voidable as to them, as, for example, when it fails to conform to the provisions of the statute governing the subject,[9] or when it was made with the fraudulent intent to delay and hinder creditors.[10] In determining whether or not an assignment is fraudulent as against creditors, the question is not whether fraud may be committed by the parties to it, but whether the instrument itself is fraudulent in operation. If it is valid in its creation, it is not invalidated by subsequent fraudulent or illegal acts of the parties.[11] It is not necessary that the assignee should have been a party to the fraud in order to entitle a creditor to have an assignment set aside on that ground.[12] Power to sell on credit conferred upon an assignee of the debtor's own selection may generally be presumed to lead to collusion for the benefit of the debtor.[13] The mere fact that a creditor has filed a bill against the assignee praying for a distribution of assets will not prevent him, after becoming a judgment creditor, from filing a supplemental bill attacking the assignment for fraud since discovered.[14] A creditor's bill will lie in favor of a judgment creditor, after the return of an execution unsatisfied to set aside a void transfer of the personal property of his debtor which was intended as an assignment for the benefit of creditors to the exclusion of such creditor; and

8. Civ. Code, § 3239.

9. Civ. Code, §§ 3449–3473; Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703; Watkins v. Wilhoit, 4 Cal. Unrep. 450, 35 Pac. 646.

10. In re Beadle, 5 Sawy. (U. S.) 351, Fed. Cas. No. 1155; Baker v. Bartol, 6 Cal. 483.

11. In re Beadle, 5 Sawy. (U. S.) 351, Fed. Cas. No. 1155.

12. Baker v. Bartol, 6 Cal. 483.

13. Billings v. Billings, 2 Cal. 107, 56 Am. Dec. 319 (this case was decided prior to the enactment of sections 3449–3473 of the Civil Code controlling assignments for the benefit of creditors).

14. Baker v. Bartol, 6 Cal. 483.

in such a case he is not required to pursue the statutory remedy of proceedings supplementary to execution, such remedy not being adequate to reach the property in the hands of the transferee who asserts title under the transfer adversely to him.[15]

Estoppel.—As a general rule, apart from the provisions of the code as to the validity of an assignment, creditors who prove and file their claims thereunder in the manner prescribed by law thereby waive all objections to the regularity of the assignment, and to the title of the assignee to the assets.[16] However, it seems that creditors who have filed their claims are not estopped to deny the validity of an assignment by a mining corporation of its ground for their benefit during such time as such assignment may remain unratified by its stockholders.[17]

15. Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703.

16. Henry Cowell Lime etc. Co. v. Smith, 34 Cal. App. 92, 166 Pac. 1018; Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30.

17. Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30 (construing the act of April 23, 1880, Stats. 1880, p. 131, in relation to mining corporations).

(E. H. R.)

ASSISTANCE, WRIT OF.

I. NATURE AND SCOPE OF REMEDY.
II. PERSONS AND PARTIES CONCERNED.
III. PROCEEDINGS.

I. Nature and Scope of Remedy.

1. Definition—Nature and Origin.
2. Jurisdiction.
3. Limitations Upon Issuance of Writ.
4. Effect of Writ.

II. Persons and Parties Concerned.

5. Persons Entitled to Writ.
6. Persons Against Whom Writ is Allowed.

III. Proceedings.

7. Application.
8. Order of Proceeding and Notice.
9. Questions Involved.
10. Issuance of Writ.
11. Service and Execution.
12. Appeal.

I. NATURE AND SCOPE OF REMEDY.

§ 1. Definition—Nature and Origin.—A writ of assistance is a summary proceeding,[1] resorted to by a court of

1. Trope v. Kerns, 83 Cal. 553, 23 Pac. 691; City of San Jose v. Fulton, 45 Cal. 316; Skinner v. Beatty, 16 Cal. 156; Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.

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equity[2] to transfer the possession of lands,[3] the title or right of possession of which has been previously adjudicated by the court itself.[4] An alias writ of assistance is similar to an original writ and will be issued when the return on such original writ fails to disclose facts from which the court can clearly determine whether the writ has been fully executed.[5]

The purpose of the writ is to give power to a court of equity to enforce its own decrees, without resorting to a separate proceeding in a court of law.[6] It takes the place of the judicial writ of injunction, used in the old chancery practice, in the enforcement of decrees respecting lands.[7] Early judicial decisions reveal the use of the writ of assistance in this state.[8] The most usual use to which this remedy is put is to place the mortgagee, who has obtained a sheriff's deed to the mortgaged premises, under a judgment of foreclosure, in possession of the premises, as against the mortgagor and all persons holding under him, when there is a refusal to give up the land on presentation of the sheriff's deed.[9]

Distinctions.—Writs of assistance issued by courts of equity are to be distinguished from executions proper;[10] writs of possession issued after re-entry following an eviction;[11] and writs to recover possession of real prop-

2. City of San Joe v. Fulton, 45 Cal. 316; Montgomery v. Tutt, 11 Cal. 190; Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82; White v. White, 6 Cal. Unrep. 499, 62 Pac. 34.

3. White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

4. Sullivan v. Superior Court, 61 Cal. Dec. 253, 195 Pac. 1061; Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164; People v. Doe, 31 Cal. 220.

5. Tevis v. Hicks, 38 Cal. 234.

6. Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164.

7. See Montgomery v. Tutt, 11 Cal. 190 (where, quoting Story's Equity, § 959, it is said: "Injunctions of this sort are older than the time of Bacon, since in his ordinances, they are treated as a well-known process. Indeed, they have been distinctly traced back to the reign of Elizabeth and Edward VI, and even of Henry VIII").

8. Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.

9. See infra, §§ 5, 6.

10. See EXECUTIONS.

11. See Code Civ. Proc., § 1210; also CONTEMPTS; EJECTMENT.

erty on the determination of adverse claims or interests therein.[12]

§ 2. Jurisdiction.—The power of the court to issue and enforce a writ of assistance, rests upon the obvious principle that its power to afford a remedy must be coextensive with its jurisdiction over the subject matter,[13] since it is not sufficient for the ends of justice for a court merely to declare the right without affording the remedy. Thus, in an action for divorce, which is equitable in its nature, the court, when it has disposed of the property of the community, certainly has the further power to grant the writ to enable the parties to obtain possession of that which was within the power of the court to give.[14] The court has no jurisdiction, however, to grant the writ against a party who has never properly appeared in the action.[15] Furthermore, the power of granting the writ is limited to giving effect to judgments and decrees rendered by the court to which the application for the writ of assistance is made. One trial court is not charged with the duty of carrying into effect the judgments of another.[16] But a writ of mandate will issue from the appellate court to the lower court to compel issuance of a writ of assistance in a proper case.[17]

§ 3. Limitations upon Issuance of Writ.—It is a general rule that the writ relates back to and operates upon those rights only which have been determined by the judgment. Hence, where a new and independent right has been acquired to the property since the judgment depended upon by the petitioner, such right, or a prima facie showing thereof in the defendant, prevents the issu-

12. See QUIETING TITLE.

13. Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164; Horn v. Volcano Water Co., 18 Cal. 141; Montgomery v. Tutt, 11 Cal. 190; Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.

14. Kirsch v. Kirsch, 113 Cal. 56 45 Pac. 164.

15. Steinbach v. Leese, 27 Cal. 295.

16. People v. Doe, 31 Cal. 220.

17. Sullivan v. Superior Court, 61 Cal. Dec. 253, 195 Pac. 1061.

ing of the writ.[18] And, for like reason, the writ will not issue where it appears that the rights of the parties have been changed by reason of an agreement, or alleged agreement, subsequent to the decree, so that its issuance may work injustice;[19] or where the defendant makes even a prima facie showing of a new title by adverse possession since the decree.[20] It is also a rule that where the rights of the parties are still in litigation, the court will refuse to grant this summary remedy.[21] However, the court will not consider every pretension of title which would remit the party to his action at law. Thus, a homestead right to the premises in the defendant will not defeat the granting of the writ in a case of sale under mortgage foreclosure, if it is shown that the mortgage was given for the purchase money of the premises.[22] The rule that persons holding under an independent title cannot be dispossessed under a writ of assistance has no application where the person seeking to be restored to possession has been wrongfully dispossessed by agency of the court. All that the parties have gained or lost is due to the agency of the court, and therefore no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession. He is in no worse position after being put out by the court than he would have been in if the court had never acted; and the court cannot, without putting him out, undo its own wrong.[23]

It is also a limitation of the right that the writ will not be issued to enforce a money judgment. In such a

18. Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164; Langley v. Voll, 54 Cal. 435; Kreichbaum v. Melton, 49 Cal. 50; Henderson v. McTucker, 45 Cal. 647.

19. City of San Jose v. Fulton, 45 Cal. 317. See Sullivan v. Superior Court, 61 Cal. Dec. 253, 195 Pac. 1061.

20. Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164.

21. Autenreith v. Hessenauer, 43 Cal. 356; Skinner v. Beatty, 16 Cal. 156; Montgomery v. Tutt, 11 Cal. 190.

22. Skinner v. Beatty, 16 Cal. 156.

23. Quan Wo Chung & Co. v. Laumeister, 83 Cal. 384, 17 Am. St. Rep. 361, 23 Pac. 320.

case the only remedy is a writ of execution. Applying this rule, it has been held that a writ of assistance does not lie against any of the real property of the defendant, even though a receiver has been appointed by the court after judgment to carry the judgment into effect, for, in an ordinary money judgment there is no authority for the appointment of such receiver.[1]

§ 4. Effect of Writ.—A writ of assistance, although it puts the petitioner into immediate possession of the land, is not res judicata as to many questions that may arise in respect to such possession, and does not deprive a party of the fuller remedy afforded by an ordinary action.[2] The granting or refusing to grant the writ is not an adjudication of the title, or right of possession, of the petitioner,[3] or of the defendant,[4] and does not estop further litigation of such right.[5] And, of course, the title of third persons is not decided by a writ of assistance. Such title may as well be established in a legal proceeding, subsequent to the granting of the writ, as before.[6] Thus, a judgment that a party is not entitled to the writ does not estop him from proving in another proceeding, in an action for rents and profits, that he is entitled to the possession of the premises.[7]

II. PERSONS AND PARTIES CONCERNED.

§ 5. Persons Entitled to Writ.—The writ is the proper remedy to place the mortgagee who has purchased under

1. White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062. See RECEIVERS.
2. Trope v. Kerns, 83 Cal. 553, 23 Pac. 691.
3. Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704.
4. Daniels v. Henderson, 49 Cal. 242.
5. Daniels v. Henderson, 49 Cal. 242; Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.
6. Enos v. Cook, 65 Cal. 175, 3 Pac. 632; Daniels v. Henderson, 49 Cal. 242.
7. Enos v. Cook, 65 Cal. 175, 3 Pac. 632.

a foreclosure sale in possession under his deed, as against the mortgagor and all persons holding under him with notice after the commencement of the action.[8] It seems that, although the mortgagee who has purchased under a foreclosure sale is entitled to the writ, his grantee is not entitled to the same right, where he was not a party to the foreclosure proceedings, and is, therefore, a stranger to the record.[9] However, a former statute in regard to writs of assistance, adopted the practice prevailing in courts of equity in favor of the purchaser at a master's sale, and extended that practice to the grantee under a sheriff's deed upon a sale for taxes.[10] But, under the statute, it was held that no such right ran in favor of the purchaser from the sheriff's grantee.[11] The writ may also be granted to a petitioner who has been awarded real property in a decree of divorce, as against his wife, to recover such property in accordance with the terms of the decree.[12] However, as has been pointed out, the writ will not issue to a petitioner to enforce a money judgment.[13]

§ 6. Persons Against Whom Writ is Allowed.—Where mortgaged premises are sold to the mortgagee on a sheriff's sale, by reason of a decree of foreclosure, the writ will run against the mortgagor and all parties in possession of the land, holding under him with notice, after the commencement of the action, and who refuse to surrender

8. Taylor v. Ellenberger, 134 Cal. 31, 66 Pac. 4; Hibernia etc. Society v. Lewis, 117 Cal. 577, 47 Pac. 602; Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Enos v. Cook, 65 Cal. 175, 3 Pac. 632; Newmark v. Chapman, 53 Cal. 557; Frisbie v. Fogarty, 34 Cal. 11; Montgomery v. Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Skinner v. Beatty, 16 Cal. 156; Montgomery v. Tutt, 11 Cal. 190.

9. Langley v. Voll, 54 Cal. 435. See Sullivan v. Superior Court, 61 Cal. Dec. 253, 195 Pac. 1061, where possession under the writ was held not subject to leasehold interest.

10. Act of April 3, 1858 (Acts 1858, p. 95); City of San Jose v. Fulton, 45 Cal. 316; People v. Grant, 45 Cal. 97; Milla v. Tukey, 22 Cal. 373, 83 Am. Dec. 74.

11. City of San Jose v. Fulton, 45 Cal. 316; People v. Grant, 45 Cal. 97.

12. Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164.

13. See supra, § 3.

possession, in accordance with the decree of foreclosure.[14] Hence, the grantee of the mortgagor, who takes his conveyance after a lis pendens has been filed in a foreclosure suit, or who buys before the suit is commenced, but does not record his deed until after the suit is commenced, is bound by the judgment of foreclosure, although not made a party to the action, and is subject to be dispossessed by a writ of assistance.[15] Although the writ runs against purchasers with actual or constructive notice of the action of foreclosure, it does not run against purchasers from the mortgagor who have no notice of such proceedings.[16] Nor can it run against a third party claiming under an independent title, or who has an interest in the land apart from any interest acquired from the mortgagor.[17] Neither can it run as against one over whom the court has never acquired jurisdiction in the foreclosure proceedings.[18] When a writ of assistance is obtained against

14. Hibernia Sav. & Loan Society v. Robinson, 150 Cal. 140, 88 Pac. 720 (stating the general rule but holding that a case where a party in possession was not a party to the foreclosure suit, his possession will be protected upon motion to restrain the execution of the writ); Henderson v. McTucker, 45 Cal. 647; Tevis v. Hicks, 38 Cal. 234; Frisbie v. Fogarty, 34 Cal. 11; Steinbach v. Leese, 27 Cal. 295; Harlan v. Rackerby, 24 Cal. 561; Montgomery v. Byers, 21 Cal. 107; Montgomery v. Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Skinner v. Beatty, 16 Cal. 156; Montgomery v. Tutt, 11 Cal. 190; Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.

15. Steinbach v. Leese, 27 Cal. 295. But see supra, § 5, as to early California statute granting right to the writ to a purchaser at sheriff's tax sale.

16. Harlan v. Rackerby, 24 Cal. 561.

17. See supra, § 3.

18. Autenreith v. Hessenauer, 43 Cal. 356 (a mortgagee who forecloses a mortgage, given by one partner, and obtains a sheriff's deed for an undivided interest in partnership property, without making the other partner a party to the action, is not entitled to a writ of assistance to be placed in possession, as against a receiver of the partnership appointed by the court, upon application of the other partner to dissolve the partnership and sell the partnership property to satisfy the partnership liabilities); Steinbach v. Leese, 27 Cal. 295; Burton v. Lies, 21 Cal. 87 (where the mortgagor of certain premises sells his interest to a married man, who soon afterward dies, and the mortgagee brings an action to fore-

one of the tenants in common of a certain parcel of land, the petitioner is entitled to the possession of every part and parcel of such land, in common with, but not to the exclusion of, other parties who hold interests in the entire tract, not derived from or through the mortgagor of the petitioner.[19]

III. PROCEEDINGS.

§ 7. Application.—On an application for a writ of assistance after a judgment foreclosing a mortgage on real property, all that is required to obtain the writ, as against the parties and those claiming with notice under them after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them and a demand of possession, and their refusal to surrender it.[20] Evidence of demand of possession and refusal to surrender it may be shown by affidavit on a motion for the writ. Thus, an affidavit showing that the plaintiff had obtained a deed from the sheriff, and that plaintiff presented said deed to defendant and demanded possession of said land, and that said defendant refused to deliver possession, is proper evidence of the fact.[1] The judgment and execution, and proceedings upon which the execution issued, should be produced upon the application, in order that the court may know whether the judgment was a money judgment or otherwise.[2] Even though the judgment of the lower court has been appealed from, a writ of assistance may be applied for thereon, and in applying for the writ, evidence of the judgment-roll

close the mortgage against the executor of the deceased purchaser, a writ of assistance issued upon the decree, will not run against the widow, since she was a necessary party to the action to foreclose the mortgage, inasmuch as the property was the property of the community).

19. Tevis v. Hicks, 38 Cal. 234. See COTENANCY.

20. California etc. Bank v. Graves, 129 Cal. 649, 62 Pac. 259; Montgomery v. Middlemiss, 21 Cal. 103, 81 Am. Dec. 146.

1. California etc. Bank v. Graves, 129 Cal. 649, 62 Pac. 259.

2. People v. Doe, 31 Cal. 220.

should be introduced.[3] The application should, of course, be made to the court which has ordered the sale on its judgment or decree.[4]

§ 8. Order of Proceeding and Notice.—According to the old chancery practice, there was, first, the order for the delivery of possession; then an attachment for not complying with the order, which was seldom served and could be dispensed with; afterwards the injunction issued, which, if not obeyed, was followed by the writ of assistance. In our system, it was first stated as the rule that the order to deliver possession should be first made, unless a direction to that effect is contained in the decree, and if upon its service that is disregarded, the court can at once direct the writ to issue; but that if delivery of possession to the purchaser be directed by the decree, no preliminary order would be requisite. In such case, upon proof of disobedience to the decree, the party would be entitled, as a matter of course, to the writ as against the defendants in the suit.[5] Later, however, it was declared that, according to the present procedure, the preliminary order may be omitted even though no direction for the delivery of possession is contained in the decree. The legal effect of the decree is the same without the direction,[6] and demand that the premises be vacated and a refusal to give up possession after receipt of the sheriff's deed is all that is necessary for the granting of the writ.[7] It is expedient, though, to include a provision in the decree of foreclosure that the writ may issue without further notice, since it is incident to the execution of the judgment.[8] In cases where application is made for a

3. California Bank v. Graves, 129 Cal. 649, 62 Pac. 259.

4. People v. Doe, 31 Cal. 220.

5. Montgomery v. Tutt, 11 Cal. 190 (per Field, J.).

6. Montgomery v. Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Horn v. Volcano Water Co., 18 Cal. 141.

7. Horn v. Volcano Water Co., 18 Cal. 141.

8. Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Montgomery v. Mid-

writ of assistance, a notice of such application should be first given to the defendant, and also to the terre-tenant, if there be one, whose interest would be disturbed by the execution of the writ applied for. Such a notice previously given would operate to prevent surprise and possible injustice and peril to the rights of parties and embarrassment in the assertion of those rights.[9]

§ 9. Questions Involved.—The proceeding is not one in which questions of title can properly be determined;[10] and so, in granting a writ of assistance, the court will not undertake to adjudicate the conflicting legal or equitable rights of persons not parties to the foreclosure suit.[11] Such rights must be adjudicated in a regular suit; they should not be determined upon affidavits taken in a collateral proceeding.[12] Hence, for example, questions raised in an ejectment suit brought by a third party are not material in a hearing upon an application for a writ of assistance.[13] Applying the rule, it has been held that upon a hearing for the writ, a person taking possession after proceedings to foreclose a mortgage, of which he had notice, cannot collaterally attack the process under which the mortgaged property was sold,[14] or set up his title to defeat the issuance of the writ.[15] Nor can the defendant collaterally attack the commissioner's return

dlemas, 21 Cal. 103, 81 Am. Dec. 146; Montgomery v. Tutt, 11 Cal. 190.

9. City of San Jose v. Fulton, 45 Cal. 316. But rule does not apply where there has been a waiver of notice. Sullivan v. Superior Court, 61 Cal. Dec. 253, 195 Pac. 1061.

10. Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.

11. Hibernia Sav. & Loan Society v. Robinson, 150 Cal. 140, 88 Pac. 720; Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 104; Enos v. Cook, 65 Cal. 175, 3 Pac. 632; Daniels v. Henderson, 49 Cal. 242; Henderson v. McTucker, 45 Cal. 647; Burton v. Lies, 21 Cal. 88; Skinner v. Beatty, 16 Cal. 157; Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82. See supra, §§ 2, 4.

12. Langley v. Voll, 54 Cal. 435.

13. Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164.

14. Newmark v. Chapman, 53 Cal. 557.

15. Hibernia etc. Society v. Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82. See supra, § 6.

and deed.[16] It has been said that under no circumstance will questions raised by one who has no right to possession be considered by the court, since he can suffer no legal wrong or injury from the enforcement of the writ.[17]

§ 10. Issuance of Writ.—By the command of the writ the sheriff is required to eject and remove the defendant from the premises, and put the petitioner into full possession of all the right, title and interest therein, which the defendant possessed, also to remove from the premises, and every part thereof, every person whom he finds in the possession or occupancy of said premises, or any part or parcel thereof, claiming under or through the defendant since the date of the mortgage.[18] If a writ of assistance is improperly issued or executed, the court will, on summary motion, set aside the writ or the service and restore the possession.[19] An alias writ may be issued when the return fails to disclose facts from which the court can clearly determine whether the writ has been fully executed, and where it is made to appear to the court, by affidavits, not contradictory of the return but explanatory thereof, that the writ has not been fully executed. But such writ may be issued on motion of the party for whose benefit the original writ issued. If the rights of the applicant in the premises, by virtue of his purchase, have been fully disclosed to the court, the court in its order directing the writ to issue should specifically direct the proceedings of the officer in the execution of the writ.[20] The writ cannot exceed the decree upon which it was issued, and therefore can issue only against a party bound by the decree.[1]

16. Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.

17. White v. White, 6 Cal. Unrep. 499, 62 Pac. 34 (reversed in bank on other grounds, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062).

18. Tevis v. Hicks, 38 Cal. 234.

19. Skinner v. Beatty, 16 Cal. 156.

20. Tevis v. Hicks, 38 Cal. 234. See supra, § 1, as to alias writ.

1. Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82. See supra, § 6.

§ 11. **Service and Execution.**—If, through the fault of the sheriff, the writ is not executed at the earliest practicable moment, he is responsible for the consequences of his dereliction of duty, however remote or unexpected these consequences may be. Thus, where the sheriff delays to execute a writ, and where between the time of its issuance and the time of its execution the parties in possession destroy a number of valuable fixtures, and, by their willful and malicious acts, injure and damage the premises in other respects, it has been held that the sheriff is liable for the damage.[2] And if he neglects or refuses to fully execute the writ, or makes a false return of his acts thereunder, he is liable to the party aggrieved as for neglect of duty or false return.[3] He has no discretion whatever upon the subject of delivering possession under a writ of assistance. He cannot urge that prima facie the writ was executed with reasonable dispatch; it is his duty to execute it at the earliest practicable moment.[4] If by the execution of the writ the sheriff attempts to remove anyone who holds under a title derived from a source independent of the party through whom the purchaser claims,[5] the execution of the writ of assistance may, upon motion, be restrained.[6]

§ 12. **Appeal.**—An appeal from an order granting or refusing to grant a writ of assistance should ordinarily be taken from the order itself, in accordance with the general rule that where an order which is the subject of an appeal is regularly entered in a cause, a party supposing himself to be affected thereby is not ordinarily at liberty to assail it by means of a subsequent motion to set it aside, but is held to the taking of an appeal therefrom within the time limited by statute for that purpose.[7]

2. Chapman v. Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

3. Tevis v. Hicks, 38 Cal. 234.

4. Chapman v. Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

5. Tevis v. Hicks, 38 Cal. 234.

6. Hibernia Sav. & Loan Society v. Robinson, 150 Cal. 140, 88 Pac. 720. See supra, § 6, as to parties against whom writ will issue.

7. City of San Jose v. Fulton, 45 Cal. 316 (stating the rule generally,

But this rule applies only to such orders or proceedings as are regularly had. It does not apply to an ex parte order taken at the instance of a mere intruder in the case;[8] or where the record in the original proceeding does not show the rights of the aggrieved party;[9] or where the person appealing was not a party to the record in the granting of the original writ. The only manner in which he can appeal is to become a party to the record by a motion to set such order aside, or if he is evicted under the writ, by a motion to be restored to the possession. If such motion is denied, he can then appeal from the order denying the motion, but not from the original order.[10] The reason for the necessity of appealing from the refusal to vacate the original order in such cases is obvious, since upon an appeal from an original order by persons not parties to the original suit, there can be no showing that they are parties aggrieved by such writ, and consequently have no standing on appeal.[11]

but holding that it did not apply in the particular case, since appeal was taken by one who was not a party to the original proceeding).

And see the following references in the article APPEAL AND ERROR, vol. 2: § 24, as to orders after judgment; § 30, as to orders to vacate judgment; § 31, note 16, as to appeal from order refusing to set aside writ of assistance irregularly issued; and § 32, note 4, as to ex parte orders for writ issued on ex parte application.

See Mills v. Smiley, 9 Idaho, 317, 76 Pac. 783 (reviewing the California cases and stating the result as follows: "It would seem from these decisions that the rule in California is that if a party were not a party to the suit at the time of the issuance of the writ of assistance he may come in and file his motion, . . . and ask to have the order set aside and in case of refusal, appeal from the order denying his motion. On the other hand, if a party to a suit at the time of the issuance of the writ, he would be required to appeal from the order granting the writ. We think this the correct and equitable rule").

8. City of San Jose v. Fulton, 45 Cal. 316 (the court states that in the absence of notice of the application actually given, a party is not to be held to knowledge of the entry of an order obtained by one who is not already a recognized adversary in the case). But see Horn v. Volcano Water Company, 18 Cal. 141, in which the court says that an appeal should be made from the refusal to set the original order aside, even though the party appealing was a party defendant in the original proceeding.

9. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48.

10. People v. Grant, 45 Cal. 97.

11. Miller v. Bate, 56 Cal. 135.

ASSOCIATIONS.

I. INTRODUCTORY.
II. UNINCORPORATED ASSOCIATIONS.
III. INCORPORATED ASSOCIATIONS.

I. Introductory.

1. Terminology.
2. Scope of Article.

II. Unincorporated Associations.

3. Status and Rights in General.
4. Constitution and By-laws.
5. Membership in General.
6. Expulsion of Members.
7. Amendment or Repeal of By-laws—Authority and Liability of Officers.
8. Intervention of Courts.
9. Actions by and Against, in General.
10. Parties.
11. Service of Summons.
12. Effect of Judgment.
13. Dissolution.
14. Incorporation.

III. Incorporated Associations.

IN GENERAL.

15. Co-operative Business Corporations.
16. Agricultural, Viticultural and Horticultural Associations.
17. Chambers of Commerce, Boards of Trade and Mechanics' Institutes.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 194 Pac.

18. Societies for the Prevention of Cruelty to Children and Animals.
19. Clubs.

CO-OPERATIVE BUSINESS ASSOCIATIONS.

20. Formation, Organization and Purpose.
21. By-laws—Powers.
22. Membership—Liability—Dissolution.

I. INTRODUCTORY.

§ 1. Terminology.—Generally speaking, the word "association" is one of vague meaning, used to indicate a collection of persons who have joined together for a certain object. The term is sometimes applied to large partnerships or unincorporated companies, and sometimes to corporations formed, not for profit, but for the advancement of some object in which the members are interested. And the word "club" likewise has no very definite meaning. The term "association of persons" is often, and not inaptly, employed to describe a corporation, for an incorporated company is an association of individuals acting as a single person, and by their corporate name. And so it has been held that the word "association," as used in a provision of the law exempting from taxation property owned by any religious, scientific, literary or benevolent association, includes corporations of such character. A "syndicate" is an association of individuals, formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested.[1]

In legal terminology "association" usually refers to an unincorporated society or body of individuals, formed for social, political, moral, religious, benevolent, protective, or mutual purposes, or to promote some public,

1. 25 Ruling Case Law, p. 45 et seq. And see note, 2 A. L. R., p. 1606, as to the meaning of the term "association" within the Income Tax Act.

scientific, or educational object, or to facilitate business, and not for purposes of trade or direct pecuniary profit. However, the term has frequently been used to designate incorporated as well as unincorporated societies organized for some such end. This broader meaning is adopted by the code, and, unless the more restricted meaning is designated, will be employed in this article.[2]

§ 2. Scope of Article.—Under this topic, the legal status and rights of unincorporated associations in general, and the rights of the members thereof, will be considered; and the article will treat also of corporations of miscellaneous types partaking more of the nature of associations, under the original significance of the term, than of corporations proper, excepting, however, such corporations of this character as are given separate treatment in other articles of this work. No attempt will be here made to include, except perhaps by way of illustration, matters relating to particular societies, associations or combinations;[3] or such matters as combinations of employees or employers;[4] or combinations in restraint of trade;[5] or matters relating to lodges and fraternities,[6] educational institutions,[7] medical societies,[8] charitable organizations,[9] nonprofit co-operative corporations,[10] or stock exchanges.[11] Matters pertaining to corporations proper, whether general or specific in character, are treated elsewhere in the work.[12]

2. See infra, § 2, for enumeration of different types of associations, societies, clubs, etc., and for scope of treatment.

3. See JOINT ADVENTURES; JOINT STOCK COMPANIES; MUTUAL BENEFIT SOCIETIES; PARTNERSHIPS; RELIGIOUS SOCIETIES.

4. See LABOR.

5. See MONOPOLIES AND COMBINATIONS.

6. See MUTUAL BENEFIT SOCIETIES.

7. See SCHOOLS; UNIVERSITIES AND COLLEGES.

8. See PHYSICIANS AND SURGEONS.

9. See CHARITIES.

10. See CORPORATIONS. But see infra, §§ 20–22, for treatment of co-operative business associations.

11. See EXCHANGES.

12. See generally, CORPORATIONS; and for specific types of associations or corporations treated under separate titles, see BUILDING AND LOAN

II. UNINCORPORATED ASSOCIATIONS.

§ 3. Status and Rights in General.—Except to the extent that they are recognized as such by statute,[13] unincorporated associations are not regarded as legal entities. They are not bodies politic and corporate; nor are they recognized by the law as persons. They are mere aggregations of individuals called, for convenience, by a common name,[14] and are essentially creatures of contract.[15] Such associations are sometimes considered as being in the nature of partnerships.[16] This, however, is principally with reference to the liability of the members to third parties,[17] each member being individually liable as a partner for a debt so contracted as to be binding on the association as a whole.[18] In other respects, unincorporated associations differ radically from partnerships. One fundamental difference lies in the fact that whereas a partner may bind his copartners by his contracts,[19] a member of an association has no general authority to bind his associates.[20]

Due to the fact that unincorporated organizations are not recognized as legal bodies, they cannot acquire or hold property. Property ostensibly held by such an association is deemed to belong jointly to the members thereof. For the same reason, such associations cannot sue or be sued as such. In suits where they are appar-

ASSOCIATIONS; COUNTIES; JOINT ADVENTURES; JOINT STOCK COMPANIES; MUNICIPAL CORPORATIONS; MUTUAL BENEFIT SOCIETIES; RELIGIOUS SOCIETIES; TOWNS.

13. See infra, § 10, as to statute authorizing suits against such associations by their common name.

14. Grand Grove etc. v. Garibaldi Grove, 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486.

15. See infra, § 4.

16. Goodlett v. St. Elmo Inv. Co., 94 Cal. 297, 29 Pac. 505; Gorman v. Russell, 14 Cal. 531; affirmed, 18 Cal. 688. And cases cited infra.

17. Goodlett v. St. Elmo Inv. Co., 94 Cal. 297, 29 Pac. 505.

18. Warman etc. Co. v. Redondo Beach Chamber of Commerce, 34 Cal. App. 37, 166 Pac. 856; Webster v. San Joaquin Fruit etc. Assn., 32 Cal. App. 264, 162 Pac. 654.

19. See PARTNERSHIP.

20. McConnell v. Denver, 35 Cal. 365, 95 Am. Dec. 107.

ently parties, the real parties are the members of the association who are sued by the common name, merely for the sake of convenience.[1] Even in this capacity they are entitled to recognition in the courts for the enforcement of their rules only when there is also involved the determination of some civil right or some right of property, and in these cases the courts are limited to inquiring whether the rules prescribed by the organization for the determination of the right have been followed.[2] However, the legislature may, within constitutional limitations, confer such powers upon unincorporated associations as it sees fit, and it has been held that a change in their personnel will not take away powers so conferred.[3]

§ 4. Constitution and By-laws.—A voluntary unincorporated association may adopt articles of association or a constitution and by-laws for the regulation of the association and providing for the admission of members, the election of certain of its officers, and similar matters. When adopted, the constitution and by-laws constitute a contract between the association and its members, and the rights and duties of the members as between themselves and in their relation to the association, in all matters affecting its internal government and the management of its affairs, are measured by their terms.[4]

The articles of association bear to it the same relation that a charter bears to an incorporated society, and constitute its fundamental law, in accordance with which

1. Grand Grove, etc., v. Garibaldi Grove, 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486. See infra, § 10.

2. Lawson v. Hewell, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763.

3. In re Bulger, 45 Cal. 553.

4. Meyer v. Bishop, 129 Cal. 204, 61 Pac. 919; Lawson v. Hewell, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763; Levy v. Magnolia Lodge I. O. O. F., 110 Cal. 297, 42 Pac. 887; Grand Grove U. A. O. of D. v. Garibaldi Grove etc., 105 Cal. 219, 38 Pac. 947; Hogan v. Pacific Endowment League, 99 Cal. 248, 33 Pac. 924; Dingwall v. Amalgamated Assn. etc., 4 Cal. App. 565, 88 Pac. 597. And see cases and references infra.

all subsequent by-laws, regulations and amendments must be made. The obligation of this class of contracts for the payment of money, or for the security of any other right of property, are as sacred as those of any other contract, and a breach thereof will be remedied by the courts.[5] To such articles and to legislation subsequently to be enacted, every member assents in joining the association. Thus there arises a special law, resting on the agreement of the members, and binding on them.[6] It has been held that what might be invalid as a by-law of a corporation, as being unreasonable, may nevertheless be valid as a rule of an unincorporated association if signed or agreed to by all the members.[7]

The constitution or by-laws ordinarily define the duties and authority of the officers;[8] the terms, conditions and qualifications for membership in the association;[9] the grounds of, and procedure for, the suspension or expulsion of its members;[10] and matters generally that relate to the administration of the association affairs.[11]

Meetings.—The constitution or by-laws ordinarily fix the manner of calling meetings. When, however, no such provision has been made, or when those whose duty it is to call a meeting neglect or refuse to do so, the members themselves are authorized by statute to call a meeting after publication of notice.[12]

§ 5. Membership in General.—Membership in a voluntary association is not a right which can be gained in-

5. Hogan v. Pacific Endowment League, 99 Cal. 248, 33 Pac. 924. See infra, § 7, as to right to amend or repeal by-laws.

6. Grand Grove, etc., v. Garibaldi Grove, etc., 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486; Lawson v. Hewell, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763.

7. Levy v. Magnolia Lodge I. O. O. F., 110 Cal. 297, 42 Pac. 887.

8. See infra, § 7, as to authority and liability of officers.

9. See infra, § 5.

10. See infra, § 6.

11. See infra, this section, as to meetings; and see, generally, cases cited in this section and in other sections referred to herein.

12. Civ. Code, § 653ha.

dependently and then enforced. It is rather a privilege which may be withheld, or accorded on such terms and conditions as the association sees fit to impose.[13] Once acquired, it is a personal right,[14] which, resting as it does in contract,[15] can only be divested in the manner provided in the contract.[16] The holder of such personal right of membership will be protected against any unauthorized act or proceeding on the part of his fellow-members, either as individuals, or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed.[17]

Liability of members.—While as against a creditor of an association each member is individually liable for the entire debt,[18] as between the members themselves each is bound to pay only his numerical proportion of its indebtedness.[19] If the association has come to a natural termination by reason of its objects being fully accomplished, and all its debts and liabilities have been settled, the members are not liable to further assessments by the directors.[20]

§ 6. Expulsion of Members.—An unincorporated association is not vested with the right of expulsion by the general law of the land, but by the agreement of the members as expressed in its constitution and by-laws.[1] Consequently, except in the case of conduct subversive of the fundamental objects of the association, no member can be expelled therefrom, and thus deprived of his share of its property, unless for violation of some explicit

13. Lawson v. Hewell, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763.

14. Dingwall v. Amalgamated Assn. etc., 4 Cal. App. 565, 88 Pac. 597.

15. See supra, § 4.

16. See infra, § 6.

17. Dingwall v. Amalgamated Assn. etc., 4 Cal. App. 565, 88 Pac. 597.

18. See supra, § 3.

19. Webster v. San Joaquin Fruit etc. Assn., 32 Cal. App. 264, 162 Pac. 654.

20. Lowe v. Woodard, 1 Cal. Unrep. 799 (association formed by land owners to defend lawsuit).

1. Grand Grove, etc., v. Garibaldi Grove, etc., 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486.

provision of the law of the association creating the offense with which he is charged, and prescribing expulsion as the penalty.[2] And the failure of a member to appear when he is chargeable with an offense which is not made ground of expulsion cannot confer upon the association any further authority than is given by its constitution and rules. The enumeration of certain offenses for which the penalty of expulsion may be imposed operates to exclude by implication the right to inflict such penalty for any other offense.[3]

To justify expulsion, there must be a written charge in the nature of an indictment or information referring, either expressly or by implication, to the particular provision of the law violated, and describing some specific act or acts as constituting the offense. And the party accused must also have due notice of the trial of the charge and an opportunity of being heard in his defense.[4] In the matter of an expulsion, the association acts in a quasi-judicial character, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws (such laws not being in violation of the laws of the land or any inalienable right of the member), its sentence is conclusive, like that of a judicial tribunal.[5] And mandamus will not lie to restore the expelled member to membership.[6] But if for any reason the decision of the tribunal

2. Grand Grove, etc., v. Garibaldi Grove, etc., 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486; Otto v. Journeymen Tailors' P. & B. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217; Dingwall v. Amalgamated Assn., etc., 4 Cal. App. 565, 88 Pac. 597.

3. Dingwell v. Amalgamated Assn., etc., 4 Cal. App. 565, 88 Pac. 597.

4. Grand Grove, etc., v. Garibaldi Grove, etc., 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486; Levy v. Magnolia Lodge I. O. O. F., 110 Cal. 297, 42 Pac. 887.

5. Otto v. Tailors' P. & B. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

6. Levy v. Magnolia Lodge I. O. O. F., 110 Cal. 297, 42 Pac. 887; Rorke v. San Francisco Stock & Exchange Board, 99 Cal. 196, 33 Pac. 881.

is void, the disciplined member will be reinstated by the courts.[7]

§ 7. Amendment or Repeal of By-laws—Authority and Liability of Officers.—As a general rule, unincorporated associations have the right to alter, amend or repeal their laws, or to enact others consistent with the purpose for which they are organized, provided the change or amendment be adopted in accordance with the mode prescribed therefor.[8] If, however, any change or amendment would impair the obligation of the original contract, it can be made only by consent of all members to be affected thereby. Such consent, it has been held, is not implied in an article which confers upon the board of directors power "to enact laws for the government of the league"; because it must have been understood that this power was limited by the laws of the land with reference to which the article conferring it must be construed. The mere fact that the articles of association constituting the contract do not operate equally upon the individual members does not confer authority upon the directors to change or amend such articles in such a way as to impose burdens on the members other than those authorized by the original articles.[9] Those to whom the management of the affairs of an unincorporated association is intrusted have only such authority as is expressly conferred or arises by necessary implication from their acts recognized by the association with full knowledge of the acts at the time of the recognition.[10]

7. See infra, § 8.

8. Lawson v. Hewell, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763.

9. Hogan v. Pacific Endowment League, 99 Cal. 248, 33 Pac. 924.

10. Hogan v. Pacific Endowment League, 99 Cal. 248, 33 Pac. 924; McConnell v. Denver, 35 Cal. 365, 95 Am. Dec. 107. And see the following cases cited in McConnell v. Denver, supra, to the rule: Settembre v. Putnam, 30 Cal. 490 (mining partnership); Duryea v. Burt, 28 Cal. 569 (mining partnership); Bradley v. Harkness, 26 Cal. 69 (drawing distinction between copartnership and tenancy in common); Skillman v. Lachman, 23 Cal. 196, 83 Am. Dec. 96 (mining partnership); Abel v. Love, 17 Cal. 233 (tenancy in common).

So long as the officers of such an association keep within the scope of their authority, they are not liable to the other members for losses incurred by the association.[11] However, they are liable for their wrongful acts.[12]

§ 8. Intervention of Courts.—It is only when there is an abuse of discretion, or a clear, unreasonable and arbitrary invasion of private rights, that courts will assume jurisdiction of unincorporated associations on the complaint of a member.[13] Moreover, the rule is well settled that even in such cases the courts will not interfere at the instance of an aggrieved member until he has exhausted all the remedies afforded him by the constitution or by-laws of the association, or shows good excuse for not having done so.[14] The articles of association usually provide a penalty for the violation of any of their provisions, and the mode of its enforcement, as well as a tribunal which shall determine whether the penalty has been incurred.[15] And, in so far as a remedy is so provided within the association, it must first be availed of by the members. An outside movement will be ineffective.[16]

11. Meyer v. Bishop, 129 Cal. 204, 61 Pac. 919 (stating the rule in reference to a mutual endowment association that had gone through the form of incorporating but which, it was alleged, was not a corporation de jure or de facto); Perkins v. Fish, 121 Cal. 317, 53 Pac. 901 (stating the rule).

12. Florence v. Helms, 136 Cal. 613, 69 Pac. 429 (holding that, in an action for damages for unlawful conversion of the property by the officers of an association, the action being brought by certain members on their behalf and on behalf of all the members of the association, pursuant to a right so to sue under Code Civ. Proc., § 382, the right of the officers to the custody of the property was not involved).

13. Lawson v. Hewell, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763; Von Arx v. San Francisco Gruetli Verein, 113 Cal. 377, 45 Pac. 685; Otto v. Tailors' P. & B. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

14. Robinson v. Templar Lodge, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170; Levy v. Magnolia Lodge, I. O. O. F., 110 Cal. 297, 42 Pac. 887; Otto v. Journeymen Tailors' etc. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

15. Grand Grove A. O. of D. v. Garibaldi Grove, etc., 105 Cal. 219, 38 Pac. 947.

16. McCallion v. Hibernia Sav. &

When, however, the courts take jurisdiction, they will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character.[17]

In cases of expulsion.—Where a member has been expelled, the courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not it was in good faith, and whether or not there was anything in it that was contrary to the laws of the land.[18]

As the foundation of the jurisdiction of the court in such cases is the right of property of which the member is deprived by expulsion, to entitle him to intervention by the courts, he must show that he has a severable proprietary interest in the property. The interest of a member in the property of an association when merely incidental to his membership will not prevent his expulsion if his right of membership has been forfeited; nor will it give the courts any right to prevent the investigation of the charge against him or to determine its sufficiency.[19]

If the laws of the association provide for an appeal to a higher tribunal of the association in cases of expulsion, that remedy, pursuant to the general rule stated above, should be exhausted before applying to the courts. However, the affirmance of an illegal expulsion upon such appeal cannot validate an illegal order made in violation of the constitution. In such case the court having jurisdiction may, in an action brought for the purpose, decree that the member be reinstated in his membership.[20]

Loan Soc., 70 Cal. 163, 12 Pac. 114. See note, 1 A. L. R., p. 423, as to right of member wrongfully expelled to equitable relief where he has actually violated the rules of the association.

17. Otto v. Tailors' P. & B. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

18. Josich v. Austrian Ben. Soc. etc., 119 Cal. 74, 51 Pac. 18; Robinson v. Templar Lodge, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170; Von Arx v. San Francisco Gruetli Verein, 113 Cal. 377, 45 Pac. 685; Otto v. Tailors' P. & B. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

19. Lawson v. Hewell, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763.

20. Dingwell v. Amalgamated Assn., etc., 4 Cal. App. 565, 88 Pac. 597.

On behalf of association.—The courts are no more inclined to interfere in the affairs of an unincorporated association at the instance of the association than on the complaints of the individual members. But, as the payment of money or the delivery of property cannot be enforced by the machinery of such an organization, the aid of the judicial tribunals of the state is required. In order, however, to invoke this aid, it is incumbent upon the association to show a right in itself to the money or property sought, and that the member is under an obligation to comply with its demand therefor.[1]

§ 9. Actions by and Against, in General.—It is well settled that an unincorporated association has not the legal capacity to sue in its own name.[2] And it is equally well established that without express statutory authority an unincorporated association cannot be sued in its own name, but that the action must be against the individual members, or some of them, as representatives of all, or against its governing board of trustees or committee if by its rules it has intrusted its management and control to such officers.[3] By force of the statute, however, in the state of California, unincorporated associations may be sued by their common name.[4] By its terms the statute is limited in its application to an association of

1. Grand Grove A. O. of D. v. Garibaldi Grove, etc., 105 Cal. 219, 38 Pac. 947.

2. Agricultural Extension Club v. Hirsch & Son, 39 Cal. App. 433, 179 Pac. 430 (where the defect of incapacity of the association to sue was held to have been waived).

3. Herald v. Glendale Lodge No. 1289 B, P. O. E., 31 Cal. App. Dec. 591, 189 Pac 329.

4. Code Civ. Proc., § 388, provides as follows: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

two or more persons "in business" under a common name. The decisions are by no means in harmony or determinative as to the meaning to be attached to the word "business" in this connection. On the one hand, it has been declared that the furnishing of accessories for the benefit of the members, the fixing and collecting of fees, dues and fines, and other similar acts, although in the nature of business, do not in themselves constitute a "business" for the transaction of which individuals associate themselves in the name of an association.[5] And it has been held that an unincorporated association organized for the general promotion of the business interests and general prosperity of the community is not a business organization such as is contemplated by the statute.[6] But the later and perhaps more favored rule is that the term "business" as used in the statute has a common and general application to all sorts of enterprises which engage people's attention and energies; that it refers to an association of two or more persons who join themselves together for the purpose of transacting as a single body any kind of business, whether for profit to themselves or for charitable or philanthropic purposes; that where persons so associated, to effectuate the specific objects of their association and for the benefit thereof, create liabilities against themselves, as such associates, they may be proceeded against by their common name in any action to enforce the liabilities so created.[7]

See Kendrick v. Diamond Creek Consol. Min. Co., 94 Cal. 137 (holding that under section 16 of article XII of the constitution an unincorporated association may be sued for negligence in the county where its liability arose).

See infra, § 10, as to parties; § 11, as to service of summons; and § 12, as to effect of judgment, under the above code provision.

5. Swift v. San Francisco S. & E. Board, 67 Cal. 567, 8 Pac. 94.

6. Warman etc. Co. v. Redondo Beach C. C., 34 Cal. App. 37, 166 Pac. 856. See King v. Randlett, 33 Cal. 318 (holding that such statutes, being in derogation of the common law, are to be strictly construed, and hence, that such a statute will not be construed as authorizing suit to be brought against an association by a name which is not the one under which the members transacted their business).

7. Herald v. Glendale Lodge No.

§ 10. Parties.—The rule requiring all persons materially interested to be made parties to a suit is dispensed with when it is impracticable or very inconvenient to comply with it, as in cases of associations composed of numerous individuals. Hence, it is a rule that associations may sue or be sued by representation.[8] It is proper, though, to join all the members of an unincorporated association as parties in an action concerning the association.[9] The statute authorizing suits against unincorporated associations by their common name[10] recognizes an unincorporated association as a distinct legal entity against which the association obligations may be enforced.[11] And although the judgment in an action so brought binds not only the joint property of the associates, but also the individual property of those served with process,[12] it is still true that the action contemplated by the statute is one against the associates, as such, to enforce a claim against the association, and is not an action against the individual members, unless they are, as

1289, B. P. O. E., 31 Cal. App. Dec. 591, 189 Pac. 329 (holding, however, that, irrespective of which of the conflicting constructions of section 388, Code Civ. Proc., should prevail, there had been a waiver of the point in this case, since an appearance had been filed without raising the point of misnomer or misjoinder of legal capacity of the parties); Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409. See infra, § 10, as to parties.

8. Florence v. Helms, 136 Cal. 613, (holding that a complaint alleging that the plaintiffs are members of an association having a large membership and that the action is prosecuted on behalf of the association and all the members thereof, shows that the plaintiffs are proper parties to prosecute the action); Gieske v. Anderson, 77 Cal. 247, 19 Pac. 421 (citing Code Civ. Proc., § 382); Gorman v. Russell, 14 Cal. 531, affirmed, 18 Cal. 688; Von Schmidt v. Huntington, 1 Cal. 55. See PARTIES.

9. Senior v. Anderson, 115 Cal. 496, 47 Pac. 454.

10. Code Civ. Proc., § 388. For terms of statute, see supra, § 9.

11. Artana v. San Jose Scavenger Co., 181 Cal. 627, 185 Pac. 850; Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409; Asbestos etc. Co. v. Lennig Rapple Co., 26 Cal. App. 177, 146 Pac. 188; Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 Pac. 690, 122 Pac. 835.

12. Code Civ. Proc., § 388. See supra, § 9; Zimmerman v. Prior, 31 Cal. App. Dec. 420, 188 Pac. 836.

individuals, made parties thereto.[13] However, under this statute it is proper to proceed against both the association and its members, and such is the proper procedure when the members have bound themselves as individuals as well as associates in the association to the liability sought to be enforced.[14] Where the action as against the members as individuals proves to be, in point of fact, groundless, the dismissal of the action as to them involves an act no different from that in any other action in which several persons might be joined as defendants and the action dismissed as to one or more of the parties so joined.[15] An appearance by an unincorporated association sued, pursuant to the statute, under the common name, without the point of misnomer, misjoinder or legal capacity of the parties being raised by motion, demurrer or answer, will operate as a waiver of that objection.[16]

§ 11. Service of Summons.—When an unincorporated association is sued by its common name, the summons may be served on one or more of the associates;[17] and such service constitutes a service on the association.[18] But if the action is against the members of the associa-

13. Artana v. San Jose Scavenger Co., 181 Cal. 627, 185 Pac. 850; Sociedade etc. v. Santa Clara Bank, 24 Cal. App. 592, 141 Pac. 38 (holding that a cross-complaint filed by a member of an association who is being sued in his individual capacity, as an individual, and asking for relief on behalf of the association which is not a party to the suit, is demurrable).

14. Goodlett v. St. Elmo Investment Co., 94 Cal. 297, 29 Pac. 505; Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409.

15. Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409 (holding that in an action against an association and its individual members, the court acts within its jurisdiction in rendering judgment by default as to the association while demurrers interposed to the complaint are pending, and thereafter ordering a dismissal of the action against the individual members, when the time within which an appeal might be taken by the association has expired).

16. Herald v. Glendale Lodge No. 1289, B. P. O. E., 31 Cal. App. Dec. 591, 189 Pac. 329 (citing Code Civ. Proc., § 434).

17. Code Civ. Proc., § 388. For wording of this code section, see note 4, supra, § 9.

18. Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409.

tion in their individual character, service of process must be upon all in order to bind all the members individually by any judgment which may be obtained in the action.[19] It has been held that if a member of an association is actually served with process, though sued by a wrong name, a judgment by default against him is not void.[20]

In action against foreign association.—The code provides that when suit is brought against a foreign association doing business within the state, summons must be served upon the secretary, cashier or managing agent of the association.[1] A service upon an ordinary employee is not a sufficient service within the meaning of this provision.[2]

§ 12. Effect of Judgment.—It is provided by statute that when associates are sued by the name of the association the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process in the same manner as if all had been named defendants and had been sued upon their joint liability.[3] Thus, the individual property of those members who are served with process is subject to execution to satisfy the judgment rendered against the association.[4] And, while judgment cannot be rendered, under this statute, against those members who have not been served with process and have not appeared, yet a judgment entered in such action against those who have been served will not be vitiated as to them because other members who were not served are included therein.[5] In a case where the complaint

19. Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364.

20. Welsh v. Kirkpatrick, 30 Cal. 202 (decided under Practice Act, § 656; superseded by Code Civ. Proc., § 388).

1. Code Civ. Proc., § 411.

2. Booth v. Gamble-Robinson etc. Co., 139 Cal. 175, 72 Pac. 908.

3. Code Civ. Proc., § 388. For the wording of this code provision, see note 4, supra, § 9.

4. Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409.

5. Golden State etc. Iron Works v. Davidson, 73 Cal. 389, 15 Pac.

is only sufficient as against the members of the association sued individually, and is not sufficient as against the association itself, a judgment rendered against it would be obviously coram non judice, and may be vacated as such.[6] If associates are not sued by their common name, but only by their individual names, the plaintiff is entitled to judgment only against those served, and not against the joint property of the association.[7] There is authority sustaining the power of the court to issue an injunction in an action against an association under its common name which shall be operative against all members of the association having knowledge of the terms of the injunction, as well as against all its officers, agents, representatives, and employees.[8]

§ 13. Dissolution.—An unincorporated association may terminate naturally when the objects for which it was organized have been fully accomplished.[9] But such an association, when formed for a definite period, cannot be voluntarily dissolved, except by the unanimous consent of all the members. If such consent cannot be had, application must be made to a court to decree a dissolution. If the court finds it impracticable to keep the association together, such a decree will be rendered and a distribution of the effects of the association will be ordered.[10] Ordinarily, the court will dissolve such an association on the same grounds on which it will dissolve a partnership, as, for instance, for the wrongful exclusion of a member, or when members do acts inconsistent with the purposes of the organization. However, it does not follow, if the majority of an association have mistaken their powers or duties and acted under such mistake, and are willing to correct the error, that a court of equity will

20; Davidson v. Knox, 67 Cal. 143, 7 Pac. 413.

6. Maclay v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364.

7. Feder v. Epstein, 69 Cal. 456, 10 Pac. 785.

8. Armstrong v. Superior Court, 173 Cal. 341, 159 Pac. 1176.

9. Lowe v. Woodard, 1 Cal. Unrep. 799.

10. Von Schmidt v. Huntington, 1 Cal. 55.

necessarily grant relief by way of dissolving the association. When it is insisted that the conduct of certain members of an association entitles others to a dissolution, the court must consider not merely the terms of the express contract between the members, but also the duties and obligations which are implied to exist between them.[11] Where it appears to be for the interest of all parties concerned that an association be legally dissolved, it has been held that the costs and a counsel fee, on each side, should be paid out of the common fund.[12]

§ 14. Incorporation.—It is provided by the code that unincorporated associations organized for any lawful purpose other than for pecuniary profit may incorporate.[13] A substantial compliance with the laws governing the organization of corporations generally is necessary to the valid incorporation of such associations, and cannot be dispensed with as against an attack in an action of quo warranto.[14] Where an unincorporated association attempts to incorporate, and for a number of years in good faith carries on the business for which it was organized or attempted to be organized as a corporation, it constitutes a corporation de facto, and the validity of the incorporation cannot be attacked in a collateral proceeding.[15] As a consequence, the members cannot be held liable as individuals. And the principle that shields the members from the claims of persons dealing with the corporation under such circumstances is equally efficacious to protect the members as between themselves. So where no fraud is shown to have been

11. Gorman v. Russell, 14 Cal. 531, affirmed, 18 Cal. 688.

12. Von Schmidt v. Huntington, 1 Cal. 55.

13. Civ. Code, §§ 593–605.

14. Wall v. Mines, 130 Cal. 27, 62 Pac. 386; People v. Golden Gate Lodge No. 6, 128 Cal. 257, 60 Pac. 865 (holding that section 593 of the Civil Code must be construed in connection with section 292 of the Civil Code); McCallion v. Hibernia Sav. & Loan Soc., 70 Cal. 163, 12 Pac. 114.

15. Los Angeles Holiness Band v. Spires, 126 Cal. 541, 58 Pac. 1049; Perkins v. Fish, 121 Cal. 317, 53 Pac. 901.

committed by the managing members of an association, either in the attempt to incorporate, or in the conduct of its business, all the members are parties to the representation that its incorporation was valid, and, in so far as any wrong was done thereby, the members are in pari delicto, and none of them can take advantage of his own wrong as against any other.[16] A failure of a majority of the members of an association in their attempt to incorporate furnishes no grounds for excluding such members from their property rights in the association where they have manifested no intention to withdraw from the association.[17] It is a rule that members admitted after the incorporation of a voluntary association have all the rights and privileges, and are subject to the same responsibilities as members of the association prior thereto.[18]

III. INCORPORATED ASSOCIATIONS.

In General.

§ 15. Co-operative Business Corporations.—A co-operative business corporation is a corporation formed for the purpose of conducting any lawful business and of dividing a portion of its profits among persons other than its stockholders. The formation of such corporations within the state is authorized by statute.[19] Compliance

16. Perkins v. Fish, 121 Cal. 317, 53 Pac. 901.

17. Strong v. Los Nietos etc. Assn., 137 Cal. 607, 70 Pac. 734 (holding that the question whether the incorporating members withdrew from the association and abandoned their rights and interests therein was a question of fact depending largely upon the intention of the parties).

18. Civ. Code, § 600.

19. Civ. Code, § 653a. Respecting this code section the code commissioners have said: "This section is a codification of that part of the statute of 1877–78, page 883, defining co-operative corporations, and the section is placed in a new title designated 'Co-operative Business Corporations.' That part of the statute declaring that the by-laws may provide for the number of votes to which each shareholder shall be entitled is omitted, for the reason that it is special legisla-

with the provisions of the code with reference to the organization of corporations in general is, of course, contemplated by the statute as a prerequisite to the validity of their corporate existence. Each of such corporations may, in its by-laws in addition to the matters specified in section 303 of the Civil Code, provide the amount of profits which must be divided among persons other than its stockholders, and the manner in which and the persons among whom such division may be made.[20]

§ 16. Agricultural, Viticultural and Horticultural Associations.—The code provides as follows:

"Three or more persons engaged in the production, preserving, drying, packing, shipping, or marketing of agricultural, viticultural or horticultural products, or all of them, may form a nonprofit co-operative association, under the provisions of this title [Civil Code, title XXI], to carry on said business, and such association shall have, and may exercise, the powers authorized by this title, and the powers necessarily incidental thereto, and all other powers granted to private corporations by the laws of this state, except such powers as are inconsistent with those granted by this title."[1]

The statute provides that such associations shall not be carried on for profit, and prescribes the general rules as to membership and the certificates thereof; assignments of membership or of the property interests of a member and the conditions upon which such assignments are allowed;[2] the preparation, execution and filing of the articles of incorporation, and the matters necessary to be set forth therein;[3] the by-laws to be adopted for the government and management of the association;[4] the powers

tion, and probably unconstitutional within the decision in Krause v. Durbrow, 127 Cal. 681, 60 Pac. 438."

20. Civ. Code, § 653a. See supra, § 4, as to the nature generally of the by-laws of unincorporated associations; and see infra, § 20 et seq., as to co-operative business associations.

1. Civ. Code, § 653m.
2. Civ. Code, § 653n.
3. Civ. Code, § 653o.
4. Civ. Code, § 653p.

of such an association;[5] and the manner of amending its articles of incorporation.[6] The statute further provides that the right of an association claiming to be organized and incorporated and carrying on its business under the title relating to such associations, to do and to continue its business, may be inquired into by quo warranto at the suit of the attorney general, but not otherwise.[7]

§ 17. Chambers of Commerce, Boards of Trade and Mechanics' Institutes.—The organization of corporations for the formation of chambers of commerce, boards of trade, mechanics' institutes, and other kindred associations is authorized by statute, "for the extension and promotion of trade and commerce, or for the advancement, protection, and improvement of the mechanic arts." Twenty or more persons must execute and file articles of incorporation under this statute, in the manner prescribed for incorporations generally.[8] Such corporations may have a capital stock and issue certificates to represent the shares thereof, if the articles of incorporation contain a statement of the amount of its capital stock and the number of shares into which it is divided. The rights and privileges to be accorded to those members who become stockholders, and their obligations, are distinct from those of members at large of the corporation, and the obligations to be imposed upon stockholders in the same relation must be fixed and established by the by-laws of the corporation.[9]

Powers.—Associations of this kind have in general the powers accorded to all corporations.[10] By-laws must be adopted and these must prescribe how members of the corporation shall be admitted and how expelled; how officers, agents and servants shall be appointed. And

5. Civ. Code, § 653q.
6. Civ. Code, § 653r.
7. Civ. Code, § 653. See QUO WARRANTO.
8. Civ. Code, § 591.
9. Civ. Code, § 592.
10. Civ. Code, §§ 591, 592, 592b.

these provisions have force and effect as between private parties and the corporation.[11] Such corporations may levy and collect from their members, for the purpose of paying their proper legal expenses, assessments in such manner as may be prescribed by their by-laws.[12] They may not, however, engage in any mercantile or mechanical business.[13] When the articles of incorporation state that the right to exercise the corporate power is to be confided to the board of trustees or directors, or the executive committee of the corporation, such board or committee may exercise any or all of the corporate powers.[14]

§ 18. Societies for the Prevention of Cruelty to Children and Animals.—By a compliance with the general provisions of the code applicable to the organization of all corporations, corporations may be formed for the purpose of the prevention of cruelty to children or animals, or both.[15] Any such corporation, or a member or officer thereof, may prefer a complaint against any person or persons for the violation of a law relating to or affecting children or animals, and may aid in the prosecution of the offenders.[16] And such corporations and their officers are entitled to aid from magistrates, police officers or sheriffs, in the enforcement of all laws which relate to or affect children or animals.[17] However, a writ of mandate will not lie to compel the board of police commissioners of a city and county to issue permits to carry weapons to the agents of a corporation organized for the prevention of cruelty to children or animals.[18] Incorporated societies organized for the purpose of the prevention of cruelty to children, or any officer or member thereof, may institute proceedings for the welfare of

11. Civ. Code, § 592c.
12. Civ. Code, § 592d.
13. Civ. Code, § 592.
14. Civ. Code, § 592a.
15. Civ. Code, §§ 607–607g.
16. Civ. Code, § 607b.
17. Civ. Code, § 607c.
18. United States Prot. Assn. v. Board of Commrs., 14 Cal. App. 249, 111 Pac. 755.

vagrant, truant, disorderly, or destitute children.[19] And on its petition or that of its officers, the court may commit such a child to an orphan asylum, corporation or society for the prevention of cruelty to children, charitable or other institution, or make such other disposition thereof as may be proper for the welfare of the child.[20]

§ 19. Clubs.—Generally speaking, a club is an association organized for the purpose of promoting social intercourse among its members, and not for pecuniary gain.[1] Under the laws of the state of California, such associations may incorporate themselves.[2] When they elect to do so, the requirements of the general provisions of the Civil Code applicable to all corporations must be satisfied as well as those fixed by the provisions applying particularly to corporations of this kind.[3] The fact that a club is incorporated does not in any way affect its right to make its own rules and by-laws. Moreover, it is expressly provided by statute that incorporated social organizations may provide in their constitutions, by-laws or articles of incorporation for the admission and expulsion of members, for the election of officers, and for the conduct of their affairs generally.[4] They may hold all the property of the association owned prior to incorporation, or acquired thereafter in any manner, and transact all business relative thereto.[5] As in the case of unincorporated associations, property devoted to the uses of such clubs is beneficially owned in common by the members in equal shares.[6] A bona fide social club, if permitted by its articles of incorporation or associa-

19. Civ. Code, § 607g.

20. Civ. Code, § 607g. See Wadleigh v. Newhall, 136 Fed. 941 (construing the California statutes in reference to such proceedings). See, also, GUARDIAN AND WARD.

1. Cusner v. California Club, 155 Cal. 303, 20 L. R. A. (N. S.) 1095, 100 Pac. 868.

2. Civ. Code, § 593 et seq.

3. People v. Golden Gate Lodge No. 6, 128 Cal. 257, 60 Pac. 865.

4. Civ. Code, § 599.

5. Civ. Code, § 595.

6. Cusner v. California Club, 155 Cal. 303, 20 L. R. A. (N. S.) 1095, 100 Pac. 868.

tion, may, either by transactions with its members or members of the public, engage in business in the commercial sense as fully as any person. It has been declared, though, that a social club in its transactions with its members in the carrying on of its club-house, looking simply to the giving to them of such privileges in the property devoted to bona fide club purposes as they are all in common entitled to under the constitution and rules of the club, is not engaged in business in the commercial or trade sense.[7]

Co-operative Business Associations.

§ 20. Formation, Organization and Purpose.—The Civil Code provides that five or more persons may form a co-operative association for the transaction of any lawful business, whether for profit or not, or for the promotion of any educational, industrial, benevolent, social or political purpose.[8] Such associations must not have any capital stock, but must issue membership certificates to each member. Such a certificate cannot be assigned, so as to transfer the membership represented thereby, except, however, that by a resolution of the board of directors, it may be transferred and the transferee made a member in lieu of the last former holder.[9] An association so formed must prepare and file articles of association,[10] and it must within forty days after it so becomes an association adopt a code of by-laws for its government and management.[11] After its organization, the

7. Cusner v. California Club, 155 Cal. 303, 20 L. R. A. (N. S.) 1095, 100 Pac. 868. See Herald v. Glendale Lodge, 31 Cal. App. Dec. 591, 189 Pac. 329 (where it was held that a member of a lodge may maintain an action against the lodge to enjoin it from engaging in the habitual serving of wines and liquors in violation of the law, under circumstances calculated to inflict pecuniary loss on the lodge and its members).

8. Civ. Code, §§ 653b–653l.

9. Civ. Code, § 653b.

10. Civ. Code, § 653d.

11. Civ. Code, §§ 653e, 653ha.

purpose of the association may be altered by a vote of two-thirds of all the members, at a special election to be called for such purpose, of which notice must be given the same as the by-laws provide for the election of directors.[12] And the statute provides that two or more associations organized according to law may consolidate upon such terms, for such purposes, and by such name as may be agreed upon in writing by the members of each association.[13]

§ 21. By-laws—Powers.—The by-laws of a co-operative business association must provide for the amount of the indebtedness which such association may incur.[14] Though the statute provides that the by-laws must be subscribed by the members adopting them,[15] it has been held that a signature for a member by his duly authorized agent is sufficient. And an election of directors, though the number elected be in excess of the number provided for in its articles of incorporation, is not rendered illegal by reason of the failure to file a copy of the by-laws with the county clerk prior to the time of the election. Furthermore, the failure of an association so to file the by-laws does not render them illegal and void.[16]

Powers.—An association formed under the statute has, generally speaking, the powers conferred upon any corporation. The statute enumerates specifically many of the very comprehensive powers such an association may exercise, and, in closing the section relative to such powers, provides that it may "do all other things proper to be done for the purpose of carrying into effect the objects for which the association is formed."[17]

12. Civ. Code, § 653g.
13. Civ. Code, § 653i.
14. Civ. Code, § 653c.
15. Civ. Code, § 653e.
16. Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530.
17. Civ. Code, § 653h. See CORPORATIONS.

§ 22. Membership—Liability—Dissolution.—The statute does not require residence in this state as necessary to eligibility to become a member of a co-operative business association,[18] but merely that members shall be above the age of eighteen, regardless of sex, and otherwise qualified as the by-laws of the association provide.[19] Although the statute requires that the interest of all the members of such an association shall be equal,[20] the mere fact that more than one certificate of membership in such an association is issued to the same person is not evidence of fraud, if such person, before attempting to benefit by such issue, assigns his excess shares to persons qualified to hold them. The bona fide holder of a certificate of membership in a co-operative business association has the right to dispose of his dividends as he chooses. And it seems that the fact that a co-operative business association having a large membership has illegaly issued a small number of shares will not warrant the issuance of an injunction restraining it from carrying on its affairs.[1]

Liability.—The code provides as follows:

"The property of such association is subject to attachment and execution for its lawful debts. The interest of a member in such association, if sold upon execution, or any judicial or governmental order whatever, cannot authorize the purchaser to have any right, except to succeed, as a member in the association, with the consent of the directors, to the rights of the member whose interest is thus sold. If the directors choose to pay or settle the matter after such sale, they may either cancel the membership, and add the interest thus sold to the assets or common property of the association, or reissue the share or right to a new member upon proper payment therefor, as the directors may determine."[2]

Dissolution.—Any association formed or consolidated under this statute may be dissolved and its affairs wound

18. Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530.
19. Civ. Code, § 653c.
20. Civ. Code, § 653e.
1. Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530.
2. Civ. Code, § 653f.

up voluntarily by the written request of two-thirds of its members, addressed to the directors and specifying the reasons why the winding up of the affairs of the association is deemed advisable.[3] The right of any association claiming to be organized under the statute to do business may be inquired into by quo warranto, at the suit of the attorney general of the state, but not otherwise.[4]

3. Civ. Code, § 653j.

4. Civ. Code, § 653k.

(E. H. R.)

ASSUMPSIT.

I. INTRODUCTORY.
II. SUBJECT MATTER OF ACTION AND PERSONS AFFECTED.
III. CAUSE OF ACTION ARISING OUT OF EXPRESS CONTRACT.
IV. PROCEDURE GENERALLY.
V. JOINDER OF CAUSES.

I. Introductory.

1. Definition—Scope of Article,
2. Forms of Assumpsit.
3. Use in California.

II. Subject Matter of Action and Persons Affected.

4. Necessity of Express or Implied Contract.
5. Waiving Tort and Suing in Assumpsit.
6. Limitation of Rule as to Waiver of Tort.
7. Amount Recoverable Where Tort Waived.
8. Corporations as Parties.

III. Cause of Action Arising Out of Express Contract.

9. Necessity of Declaring on Special Contract.
10. Where Nothing Remains to be Done But Payment of Money.
11. Deviation by Consent.
12. Performance Prevented by Defendant.

IV. Procedure Generally.

13. Demurrer to Common Counts.
14. Pleading Contract, Promise and Consideration—Demand.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 194 Pac.

15. Failure to Set Forth Dates and Items of Indebtedness.
16. Defenses and Denials.
17. Special Contract as Evidence Under Common Counts.

V. Joinder of Causes.

18. In General.
19. Pleading in Alternative Counts.
20. Joinder of Common Counts in One Count.

I. INTRODUCTORY.

§ 1. Definition—Scope of Article.—The word "assumpsit" is derived from the Latin "assumere," meaning to assume or to undertake, and in the law of contracts is understood as an undertaking, either express or implied, to perform a parol agreement.[1] The action of assumpsit is divided into two classes, special and general. Special assumpsit lies upon an express contract or promise, while general assumpsit lies upon an implied contract, or upon an express contract when nothing remains to be done but the payment of money,[2] or when there has been a deviation of consent,[3] or when performance has been prevented by the defendant.[4]

Scope of article.—It is intended under this title to consider the action of assumpsit in a general manner, as a reference to the analysis of the article will show. In other articles of this work consideration is given to the quantum counts,[5] the money counts,[6] the count upon an

1. 2 Ruling Case Law, 742. See, also, San Francisco Gas Co. v. San Francisco, 9 Cal. 453 (decision by Justice Field in which it is declared that the law will raise an implied assumpsit against corporations under the same circumstances as in dealings with private individuals. See infra, § 8).

See CONTRACTS, for matters relating to the constituent elements of contracts, express and implied.

2. O'Connor v. Dingley, 26 Cal. 11. See infra, §§ 9, 10.

3. See infra, § 11.

4. See infra, § 12.

5. See SALES; WORK AND LABOR.

6. See MONEY LENT; MONEY PAID; MONEY RECEIVED.

account stated,[7] and assumpsit for use and occupation of premises.[8]

§ 2. Forms of Assumpsit.—There are various forms of general assumpsit, namely, indebitatus assumpsit, the quantum counts (quantum meruit and quantum valebat), the money counts (money had and received, money lent, and money paid), and the count upon an account stated (insimul computassent). These various forms are ordinarily known as the common counts. The term "indebitatus assumpsit" in its specific sense is applied to that form of assumpsit which is available for the recovery of any simple common-law debt—that is, for the recovery of a sum certain—without regard to any express promise to pay the debt. But in an enlarged sense the term embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money.[9] The so-called quantum counts (quantum meruit and quantum valebat) are respectively employed to recover for work and labor done, or services rendered, and for goods sold and delivered. They were devised to enable a plaintiff to recover for a benefit conferred under such circumstances as did not create either a true debt or an actionable assumpsit, but which benefit was nevertheless intended to be paid for.[10]

7. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 158.

8. See LANDLORD AND TENANT.

See infra, § 2, as to the various forms of assumpsit.

9. 2 Ruling Case Law, 745 (where it is said that, in this more comprehensive sense, the term has been applied to all of the common counts, namely, the quantum counts, the money counts, and the count upon an account stated). And see Street's Foundation of Legal Liability, vol. 3, p. 182.

In regard to the old action of debt, see People v. Crayeroft, 2 Cal. 243, 56 Am. Dec. 331 (holding that an action of debt will not lie against the keeper of a gambling-table without license to recover the amount of the license, since the penalty is uncertain).

10. 2 Ruling Case Law, 746.

§ 3. Use in California.—Although under the California system of procedure the common-law distinctions of form of action have been abolished,[11] the courts of this state have declared that substantial rights remain unchanged,[12] and they have established the rule, which has been recognized and acted upon in most of the states where the code practice has been adopted,[13] that the common counts in assumpsit may still be used in stating a cause of action.[14]

As to whether such allowance of pleading in the common counts is really in harmony with the California system of practice, a divergence of opinion has been expressed. Thus, at times it has been intimated that the use of common counts in pleading a cause of action is not strictly in compliance with the code requirements,[15] and that their retention must be regarded as impairing

11. Hurlbutt v. N. W. Spaulding Saw Co., 28 Pac. 795 (holding that under the circumstances of the case it could not be objected by the defendants that the plaintiffs have mistaken their remedy, and that the account should be for an accounting, and not in assumpsit). See ACTIONS, vol. 1, p. 309.

12. See ACTIONS, vol. 1, p. 310 et seq.

13. Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998. See 2 Ruling Case Law, p. 747.

14. Pike v. Zadig, 171 Cal. 273, 152 Pac. 923; McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 Pac. 190; Nichols v. Randall, 136 Cal. 426, 69 Pac. 26; Minor v. Baldrige, 123 Cal. 187, 55 Pac. 783; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998; Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; Leeke v. Hancock, 76 Cal. 127, 17 Pac. 937; Quimby v. Lyon, 63 Cal. 394; Abadie v. Carrillo, 32 Cal. 172; Buckingham v. Waters, 14 Cal. 146; Hunt v. City of San Francisco, 11 Cal. 250 (observing that the common counts, in the usual form adopted under the old system of pleading, are good in actions against private persons); Miller v. Abrahamson, 9 Cal. App. 396, 99 Pac. 534. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 158; MONEY LENT; MONEY PAID; MONEY RECEIVED; SALES; WORK AND LABOR.

15. Pike v. Zadig, 171 Cal. 273, 152 Pac. 923 ("If the question were new, there might be good ground for saying that the common counts do not comply with the provision of our Code of Civil Procedure, § 426, that a complaint must contain 'a statement of the facts constituting the cause of action in ordinary and concise language,'"), McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 Pac. 190. But see infra, § 13, to the point that such pleading is good as against both general and special demurrer.

the symmetry of the reformed system of procedure.[16] On the other hand, the position has been taken that the common counts are not inconsistent with section 426 of the Code of Civil Procedure, which provides that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language.[17] However, regardless of the question whether the common counts are or are not in keeping with that system of procedure adopted in California and in many other states, the practice of using them in pleading has been too long established by the courts to be now open to question.[18]

II. SUBJECT MATTER OF ACTION AND PERSONS AFFECTED.

§ 4. Necessity of Express or Implied Contract.—The common counts in assumpsit are founded on express or implied promises to pay money. They lie only in cases in which the action of debt is sustainable, as a general rule. Hence, it is that the indebitatus assumpsit count states that the defendant was, or is, indebted to the plaintiff in a certain sum of money for (stating generally the consideration), and that, being so indebted, the defendant promised to pay plaintiff the said sum of money on request.[19] Since in all cases of assumpsit there must be either an express or an implied contract, the view has been expressed that an action for use and occupation or in-

16. Abadie v. Carrillo, 32 Cal. 172 (in concurring opinion of Mr. Justice Sanderson, in which Mr. Justice Rhodes concurred).

17. Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998 (cited and followed in Miller v. Abrahamsen, 9 Cal. App. 396, 99 Pac. 534). See PLEADING.

18. Pike v. Zadig, 171 Cal. 273, 152 Pac. 923; McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1.; Minor v. Baldrige, 123 Cal. 187, 55 Pac. 783; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; O'Connor v. Dingley, 26 Cal. 20; Adams v. Pugh, 7 Cal. 151; Reynolds v. Jourdan, 6 Cal. 108; De Boom v. Priestly, 1 Cal. 206.

19. Nichols v. Randall, 136 Cal. 426, 69 Pac. 26. See infra, § 14, as to pleading contract, promise and consideration.

debitatus assumpsit for rent will not lie, where the possession is adverse and tortious, for such possession excludes the idea of a contract.[20] And it has been decided that in an action to recover money claimed to be due, the defendant cannot set off, by way of counterclaim, the value of the use and occupation of premises claimed by him which the defendant entered upon and holds under a third person, and in hostility to the defendant's alleged title.[1]

Contract to do something other than pay money.—It has been declared to be a well-settled rule that an action upon a common count will not be permitted in a case where there is an express contract to do something else than pay money, and where damages are sought because of the failure of the defendant to perform such a contract.[2] Where a common count will lie, the law implies, as a fiction which cannot be controverted, a promise or contract to pay the amount recoverable in such an action. But no such promise or contract will be implied unless a common count will lie. The implication, it is said, is created solely to sustain the common count. In a practical application of this rule it has been held that unless an action may be brought in the form of a common count, it will not support an attachment as on implied contract.[3]

§ 5. Waiving Tort and Suing in Assumpsit.—Despite the general principle that an action of assumpsit is based upon a contract, express or implied,[4] in some instances such an action may be maintainable as founded upon an implied contract when in fact there is no contract at all. For instance, if B stole A's watch, A could treat the theft

20. Ramirez v. Murray, 5 Cal. 222; Sampson v. Schaeffer, 3 Cal. 196.

1. Quinn v. Smith, 49 Cal. 163. See LANDLORD AND TENANT.

2. Willett v. Alpert, 181 Cal. 652, 185 Pac. 976; and infra, § 6. For rule where, under a contract, nothing remains to be done but the payment of money, see infra, § 10.

3. Willett v. Alpert, 181 Cal. 652. 185 Pac. 976. See ATTACHMENT, post, p. 422.

4. See supra, § 4.

as a contract of sale and sue in like manner ex contractu, though in fact there was no foundation whatsoever for the fiction other than the need of broadening A's remedies.[5] In other cases of assumpsit upon implied contract, the contract may lie at the base of the wrong or may have enabled the perpetrator to have accomplished his wrong.[6] In short, it may be pronounced as a general rule, repeatedly sanctioned by the courts of California, that where personal property is wrongfully converted, the owner may waive the tort and sue in assumpsit.[7] The basis of such

5. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1.

6. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1; Chapman v. State, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457 (holding that the liability of the wharfinger for breach of contract by negligence, causing the loss of the goods intrusted to him, was enforceable at common law by an action of assumpsit; and that the owner or consignee may sue upon the contract for the damages sustained by such negligence). See CARRIERS, for the principle that a party may, in cases relating to injury to passengers, elect between the breach of the contract to deliver him in safety and the wrong which justifies an action ex delicto. See infra, § 7, as to amount recoverable where tort waived.

7. French v. Robbins, 172 Cal. 670, 158 Pac. 188; Corey v. Struve, 170 Cal. 170, 149 Pac. 48; Bechtel v. Chase, 156 Cal. 707, 106 Pac. 81; Lataillade v. Orena, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; De La Guerra v. Newhall, 55 Cal. 21 (holding that although the complaint in indebitatus assumpsit alleged an express promise, evidence of the wrongful taking of the property under an implied promise was held sufficient, and proof of an express promise to pay was unnecessary. See infra, § 14, as to pleading contract, promise and consideration); Roberts v. Evans, 43 Cal. 380 (wherein the action was to recover the value of certain personal property alleged to have been sold and delivered by plaintiff to defendant, but proof of the wrongful taking was held sufficient to sustain assumpsit for its value); Fratt v. Clark, 12 Cal. 89; Ransch v. Arp, 39 Cal. App. 580, 179 Pac. 694 (declaring that "it is permissible for a party to waive a tort and sue upon the implied contract resulting thereunder, where no special damages are made the subject of the cause of action"); Fountain v. City of Sacramento, 1 Cal. App. 461, 82 Pac. 637. See, also, Lubert v. Chauviteau, 3 Cal. 458, 58 Am. Dec. 415 (holding that in an action against factors to compel them to account and for the proceeds arising from the sale, the plaintiff may show the manner in which defendants became possessed of the goods, and, though the proof should show that they became possessed of them wrongfully, it will

a waiver of the tort is that the owner consents to the taking of his property and affirms the act of the wrongdoer. He treats it as a sale, and may recover the value due him under an implied contract of sale.[8]

§ 6. Limitation of Rule as to Waiver of Tort.—The rule that the owner of personal property may waive the tort and sue in assumpsit does not extend to a case where he has voluntarily parted with his property in exchange for something received by him in return, since no contract will be implied by law as against an express contract not disavowed by either party. Thus, the fact that the exchange of property was induced by fraud will not give the party defrauded a cause of action based on the theory that the property surrendered was sold to the wrongdoer for an agreed sum of money.[9]

Necessity of election of remedy.—While under certain circumstances the suitor may either sue in assumpsit as upon a contract or sue in tort, he cannot do both. He must elect his remedy and stand upon his election. If he waives the tort and sues in contract, his complaint must declare upon contract only. If he waives the contract and sues in tort, the complaint must declare upon tort only.[10] It has been held, however, that an offer to take pay from one joint wrongdoer does not operate as a waiver of an action against the other in assumpsit.[11]

§ 7. Amount Recoverable Where Tort Waived.—In many jurisdictions the doctrine that where personal prop-

be sufficient to maintain an action against them, as consignees or factors). See ACTIONS, vol. 1, §§ 12, 13, 14; TROVER AND CONVERSION. And see infra, § 6, for limitations of this rule.

8. Bechtel v. Chase, 156 Cal. 707, 106 Pac. 81. See MONEY RECEIVED; SALES. See, also, ACTIONS, vol. 1, p. 322.

9. Bechtel v. Chase, 156 Cal. 707, 106 Pac. 81. See infra, § 9, as to necessity of declaring on special contract.

10. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1. See ELECTION OF REMEDIES.

11. Roberts v. Evans, 43 Cal. 380.

erty is wrongfully converted the injured party may waive the tort and sue in assumpsit[12] is limited to cases where the wrongdoer has sold the property or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds. But in California, as in a number of other states,[13] a broader rule enables one whose goods are wrongfully taken and used by another to sue in assumpsit for their value as for goods sold and delivered.[14] However, it appears that if the defendant has converted the plaintiff's personal property, and in the act of conversion, or thereafter, sells the same, and the plaintiff elects to waive the tort and sue in assumpsit, using the count for money had and received to recover the proceeds of the sale, the amount of the plaintiff's recovery is limited to the proceeds received by the defendant.[15] And it will be fatal to this form of action that the amount is not ascertainable.[16] It has also been

12. See supra, § 5.

13. Bechtel v. Chase, 156 Cal. 707, 106 Pac. 81 (citing Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; and Roberts v. Evans, 43 Cal. 380, to the rule in California, and referring to authority in other jurisdictions as to a contrary rule). See TROVER AND CONVERSION.

14. Bechtel v. Chase, 156 Cal. 707, 106 Pac. 81; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626 (wrongful removal of mortgaged crops); Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; De La Guerra v. Newhall, 55 Cal. 21 (wrongful pasturing of defendant's cattle on the plaintiff's land); Roberts v. Evans, 43 Cal. 380; Halleck v. Mixer, 16 Cal. 574 (complaint in replevin for timber cut down and removed); Pratt v. Clark, 12 Cal. 89; Fountain v. City of Sacramento, 1 Cal. App. 461, 82 Pac. 637.

15. French v. Robbins, 172 Cal. 670, 158 Pac. 188. See, also, Corey v. Struve, 170 Cal. 170, 149 Pac. 48 (declaring that "while the complaint does allege that the property was 'converted' by the defendants, . . . the action was in reality one in assumpsit for the value of the property sold, or perhaps it might be more aptly characterized as one in the nature of a suit for money had and received"). Compare Pratt v. Clark, 12 Cal. 89 (declaring that if trover would have lain, it follows that an action for money had and received will lie for the price or for the value as goods sold and delivered at the election of the plaintiff). See MONEY RECEIVED.

16. French v. Robbins, 172 Cal. 670, 158 Pac. 188 ("the foundation of the action of assumpsit, where property of the plaintiff has been wrongfully taken and sold by the defendant, is the unjust enrichment of the wrongdoer").

decided that where the plaintiff waives the tort of a representative who makes a wrongful sale, and brings an action to compel an accounting, and for the proceeds arising from the sale, the defendant must be considered as acting under the plaintiff's authority, and that the plaintiff can recover only the net proceeds of sales effected by the defendant, after deducting necessary charges and commissions.[17]

§ 8. Corporations as Parties.—The common counts, in the usual form adopted under the old system of pleading, are good in actions against private persons.[18] And it seems that there is no necessity or propriety of holding a different rule in respect to corporations of whatever kind, since the rules of pleading are general, and are designed to embrace all persons, natural or artificial, capable of suing or of being sued.[19] So the view has prevailed that corporations, including municipal corporations, may be liable to actions of assumpsit upon implied contracts within the scope of their authority.[20] And conversely,

17. Lubert v. Chauviteau, 3 Cal. 458, 58 Am. Dec. 415 (factors); Lataillade v. Orena, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 624 (where it was held that a guardian who sells personal property belonging to his ward, and denies the right of the ward to any interest therein or in the proceeds, is guilty of a conversion, and that the ward may waive the tort, and sue in assumpsit for the purchase money, or if his rights were fraudulently concealed from him by the guardian until after the final settlement of his accounts, he may sue him in equity for an accounting of the proceeds of the sale).

18. Hunt v. City of San Francisco, 11 Cal. 250. See generally, cases cited supra and infra.

19. Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503; Hunt v. City of San Francisco, 11 Cal. 250. See PLEADING.

20. Curtin v. Salmon River etc. Co., 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851 (declaring that where a corporation, receiving the benefit of a contract invalid in its execution, cannot be taken to have ratified the contract and is not estopped to deny the validity thereof, the recovery against the corporation must be, not on the express contract, which is invalid or void, but for money had and received, quantum meruit, quantum valebat, or indebitatus assumpsit, as the facts may warrant); Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189; Higgins v. San Diego

the doctrine has been sanctioned that a corporation may maintain an action of implied assumpsit against a private person,[1] or against another corporation.[2]

III. CAUSE OF ACTION ARISING OUT OF EXPRESS CONTRACT.

§ 9. Necessity of Declaring on Special Contract.— Where an action is based on an express contract, it may be stated as a general rule, that a common count will not

Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503; Argenti v. San Francisco, 16 Cal. 255 (sanctioning the principle that a municipal corporation may become liable on implied contract, when the charter does not prescribe the form of contract); Hunt v. San Francisco, 11 Cal. 250 (holding that a municipal corporation may suffer judgment by default on common counts); San Francisco Gas Co. v. San Francisco, 9 Cal. 453 (in which Mr. Justice Field said: "Under some circumstances, a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations. This is as well established by the authorities as any principle of law can be"); Morrison v. Bradley, Berdan & Co., 5 Cal. 503 (holding that a corporation may be liable on a quantum meruit for services rendered for its benefit, though the employment was unauthorized).

See, however, Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96 (holding that a municipal corporation, acting under a charter expressing the mode in which its contracts for the improvement of its property shall be made, cannot be rendered liable for improvements made in the absence of such contract, on the ground of an implied contract to pay for benefits received, on the ground that the law never implies an agreement against its own restrictions and prohibitions). See CORPORATIONS; MUNICIPAL CORPORATIONS.

1. Sims v. Petaluma Gas Light Co., 131 Cal. 656, 63 Pac. 1011 (holding that although no action could be maintained upon an express contract, an action in the nature of a quantum meruit might lie in favor of the corporation to recover the reasonable value of the work, labor and services performed and materials furnished).

2. Colusa County v. Glenn County, 117 Cal. 434, 49 Pac. 457 (holding that one county may maintain an action against another as for money had and received in a proper case, after the presentation of its claim to the board of supervisors of the latter).

support the action, but that the plaintiff must declare specially on the contract.[3] Pursuant to this rule, where an employee, hired at fixed salary, continues in the same employment after the expiration of the term of the original hiring, without any new contract as to compensation, it is presumed that the parties intended the same compensation; and in such case there can be no recovery on a quantum meruit, as the terms of the original contract control.[4] The mere fact that the employer had incorporated his business at the time of the employment under the new conditions does not preclude the application of the rule, where it might be fairly inferred from all the circumstances that the new employment was on the basis of the original contract.[5]

The general rule above expressed does not apply where the contract ~~continues executory~~ has been executed,[6] or where there has been

(See "Erratum," 1926 Supp. 209)

3. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; Barrere v. Somps, 113 Cal. 97, 45 Pac. 177 (holding that proof of a special contract under the common count is a material variance, and a motion for a nonsuit should be granted therefor upon the ground that the cause of action alleged in the complaint is not proved and that the allegations and proofs do not agree); O'Connor v. Dingley, 26 Cal. 11; Baker v. Cornwall, 4 Cal. 15 (where the defendant's obligation is in the form of a bond, the plaintiff should sue on the bond, setting out the condition, assigning breaches, and praying for the debt and damages, and the declaration should not be merely a count in assumpsit upon the condition); Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128. See infra, §§ 10, 11, 12, for exceptions to this general rule.

4. Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128 (citing Hermann v. Littlefield, 109 Cal. 430, 42 Pac. 443; Nicholson v. Patchin, 5 Cal. 475, and authorities from other jurisdictions to the rule). See MASTER AND SERVANT.

5. Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128.

6. Willett v. Alpert, 181 Cal. 652, 185 Pac. 976. ("It is well-nigh elementary that a common count will not lie to recover damages for the breach of an unexecuted contract, where the obligation breached is something other than the payment of money.") Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; O'Connor v. Dingley, 26 Cal. 11 (where the contract remains open and unrescinded, the party whose part of it is unperformed in any respect cannot sue in general assumpsit). See, also, San Francisco Gas Co. v. San Francisco, 9 Cal. 453 (per Field, J., declaring that where the contract is executory, the corporation cannot be

a deviation from the original agreement by consent,[7] or where it has been repudiated.[8] And if the mode of payment is other than in money, the plaintiff must declare specially.[9]

§ 10. Where Nothing Remains to be Done but Payment of Money.—There are certain exceptions to the general rule that where there is an express contract, the plaintiff must declare specially upon it and not sue generally on a common count.[10] And under the system of pleading at common law, it was the rule that if a party to a special contract had performed his part of it, and nothing remained to be performed thereunder but the payment of the money, he could maintain general assumpsit to recover the amount due him on the contract.[11] Hence, it has been held that where the contract has been executed, and a corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it.[12] Under the general rule above stated, it has been held that if the contract is fully executed on the part of the plaintiff, and payment was to be in money, the plaintiff may elect either to declare specially or upon the common counts. But where a term of credit has been given for the payment of money,

held bound unless the contract is made in pursuance of the provisions of its charter).

7. See infra, § 11.

8. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903 (stating the rule and the exceptions thereto); Fish v. Correll, 4 Cal. App. 521, 88 Pac. 489 (holding that the plaintiff cannot recover the contract price upon a quantum meruit, where he intentionally refused to perform the contract, and violated its terms, both as to material and as to reasonable time for performance). See infra, § 12.

9. See infra, § 10.

10. O'Connor v. Dingley, 26 Cal. 11. See supra, § 9, as to general rule; and see infra, § 11, as to deviation by consent, and infra, § 12, as to performance prevented by defendant.

11. Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; O'Connor v. Dingley, 26 Cal. 11; Donegan v. Houston, 5 Cal. App. 626, 90 Pac. 107 (citing Chitty on Pleading).

12. San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

the common counts cannot be used until such term has expired.[13]

§ 11. Deviation by Consent.—As another exception to the general rule that the plaintiff must specially declare upon an express contract,[14] the doctrine has been established that the common counts may be used if the contract has been partly performed and then extinguished by consent.[15] Thus, it has been ruled that in an action of indebitatus assumpsit, to recover for work and labor done and materials furnished, where the defendant pleads a special contract, which he alleges the plaintiff failed to perform, if the findings show that the contract was substantially complied with by the plaintiff, and that every technical failure of the plaintiff to comply with its strict letter was cured by the acts and consent of the parties, a judgment in favor of the defendant is not supported, and will be reversed upon appeal, and judgment will be ordered in favor of the plaintiff, upon the findings, for the balance due upon the contract.[16] In fact, the position has been taken that where the special contract has been deviated from or modified by common consent and the plaintiff has performed, he must sue in general assumpsit.[17] In such case, the plaintiff cannot recover upon the express contract, for the reason that the work had not been performed according to the terms of the express contract.[18] In applications of the rule under the earlier cases

13. Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127.

14. See supra, § 9, for general rule.

15. Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127.

16. Griffith v. Happersberger, 86 Cal. 605, 25 Pac. 137, 487. See WORK AND LABOR.

17. Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; O'Connor v. Dingley, 26 Cal. 11; Reynolds v. Jourdan, 6 Cal. 108; De Boom v. Priestly, 1 Cal. 206.

18. De Boom v. Priestly, 1 Cal. 206; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127 (holding that where the defendant has accepted and enjoyed the benefits of what was done under a special agreement, which was departed from, and not done in the stipulated time or manner, the plaintiff cannot recover upon the contract, but may

it was held that a parol agreement, varying the terms of a contract under seal, is properly enforced under the indebitatus assumpsit, when the parol agreement has been executed.[19]

§ 12. Performance Prevented by Defendant.—As a further exception to the general principle that the plaintiff must declare specially upon an express contract,[20] the rule has been laid down that where the performance of a special or express contract has been prevented by the defendant, the action should be brought in the form of indebitatus assumpsit, and not upon the contract.[1] And the common counts may be used if the contract has been partly performed and then extinguished by acts of the defendant. In such case the plaintiff is at liberty to treat it as at an end.[2] Thus, where the defendants, partners, employed the plaintiff on an agreement that a portion of his wages should be retained by defendants till a certain sum had accumulated, when the plaintiff should be admitted as a partner, and defendants subsequently, but before the sum had accumulated, dissolved the partnership, it was held that the plaintiff was at liberty to sue on the special contract for damages or declare for the value of his work and labor.[3]

recover the reasonable value of the benefit to the defendant). See WORK AND LABOR.

19. Whiting v. Heslep, 4 Cal. 327. See, also, Green v. Wells & Co., 2 Cal. 584 (holding that a parol agreement to rescind a contract under seal is good, if such parol agreement is executed; and that such agreement may be presumed from the acts of the parties). See Civ. Code, § 1629, as to distinctions between sealed and unsealed instruments abolished; and see CONTRACTS.

20. See supra, § 9.

1. Reynolds v. Jourdan, 6 Cal. 108; Breen v. Roy, 8 Cal. App. 475, 97 Pac. 170.

2. Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; Adams v. Pugh, 7 Cal. 150.

3. Adams v. Pugh, 7 Cal. 150. See WORK AND LABOR.

IV. PROCEDURE GENERALLY.

§ 13. Demurrer to Common Counts.—Since it is a settled rule under the code that the common counts may be pleaded, it is clear that a common count is good as against a general demurrer.[4] There have, however, been intimations by the supreme court that such a pleading, although not obnoxious to a general demurrer, might fall before a special demurrer on the ground of uncertainty.[5] But there is no force in this suggestion. If there be any objection to the common count, it is that the pleading states conclusions of law instead of setting forth the facts upon which the plaintiff relies. The real ground of objection, therefore, is that the complaint does not state facts sufficient to constitute a cause of action. And as it is admitted that the common counts are good as against a general demurrer, it would seem to follow that they are likewise good as against a special demurrer.[6] It has been ruled that in an action founded on contract, an answer which joins by way of counterclaim causes of action for goods, wares and merchandise sold and delivered, for money paid, laid out and expended, and for money had

4. Pike v. Zadig, 171 Cal. 273, 152 Pac. 923; Nichols v. Randall, 136 Cal. 426, 69 Pac. 26; Minor v. Baldridge, 123 Cal. 187, 65 Pac. 783; Shade v. Sisson etc. Co., 115 Cal. 357, 47 Pac. 135; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998; Abadie v. Carrillo, 32 Cal. 172; De Witt v. Porter, 13 Cal. 171; Freeborn v. Glazer, 10 Cal. 337. See infra, § 15, as to right to object on demurrer to the failure to set forth dates and items of indebtedness. See generally, PLEADING.

5. Minor v. Baldridge, 123 Cal. 187, 55 Pac. 783; Shade v. Sisson etc. Co., 115 Cal. 357, 47 Pac. 135 (where Beatty, C. J., said: "In Merritt v. Glidden, 39 Cal. 546, 2 Am. Rep. 479, it is plainly intimated that while such a complaint—one following the common-law forms—is good as against a general demurrer, it is not good against a special demurrer, upon the ground that it is unintelligible or uncertain"). See infra, this section, as to uncertainty as to whether complaint based on implied or express contract.

6. Pike v. Zadig, 171 Cal. 273, 152 Pac. 923; Camp v. Boyd, 41 Cal. App. 83, 182 Pac. 61.

and received, is not obnoxious to a demurrer that the answer or counterclaim was ambiguous and unintelligible.[7]

Uncertainty as to whether complaint is based on implied or express contract.—It has been said that it is the better method of pleading to state the nature of the contract, whether it be express or based upon an implied assumpsit.[8] While it is perhaps the better rule and the one more consonant with good pleading to sustain a special demurrer for uncertainty where the complaint does not show whether an express or implied contract is relied on,[9] it has been held that the defendant is not prejudiced by the overruling of such a demurrer, where, in view of the answer and trial, it cannot be said that such uncertainty affected the substantial rights of the parties.[10]

§ 14. Pleading Contract, Promise and Consideration—Demand.—Under the common-law system of pleading it was requisite that the declaration in an action of assumpsit upon an executed consideration should show that the consideration for the promise by the defendant was sufficient to support his promise, and it was sufficient to aver that the consideration was executed at his request. But

7. Clay v. Carroll, 67 Cal. 19, 6 Pac. 874. See infra, § 18 et seq. as to joinder of causes. See MONEY PAID; MONEY RECEIVED; SALES; WORK AND LABOR.

8. Preston v. Central Cal. Water & Irr. Co., 11 Cal. App. 190, 104 Pac. 462 (quantum meruit for goods sold and delivered). See PLEADING; SALES.

9. Shade v. Sisson M. & L. Co., 115 Cal. 357, 47 Pac. 135.

10. Preston v. Central Cal. etc. Irr. Co., 11 Cal. App. 190, 104 Pac. 462. In this last-cited case Mr. Justice Hart has said: "The mere denial that the defendant is indebted to the plaintiff in the sum alleged to be due would certainly raise the only important issue in the case, to wit, whether the defendant was or was not so indebted, and such issue would necessarily be thus tendered whether the alleged indebtedness was the result of an express or an implied contract." See Manning v. Dallas, 73 Cal. 420, 15 Pac. 34, where, although not considering a complaint in the ordinary form of indebitatus assumpsit, on demurrer it was said: "Under the complaint the plaintiff was entitled to recover, if he had performed services for the defendant, such sum as the defendant had agreed to pay him for his services, or if no price was fixed, then such sum as his services were reasonably worth."

this averment was unnecessary when the consideration as well as the promise were implied from the nature of the transaction set forth in the declaration.[11] Under the California system of pleading requiring only the allegation of the facts which constitute the cause of action, it is not requisite to aver either the consideration or the promise, when they are implied as a legal conclusion from the facts which are alleged.[12]

Pleading demand or request.—Since it is a rule that where money is received by one man which belongs to another, the law raises a promise on the part of the re-

11. McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761; Preston v. Central Cal. etc. Irr. Co., 11 Cal. App. 190, 104 Pac. 462; Aydelotte v. Billing, 8 Cal. App. 673, 97 Pac. 698; Donegan v. Houston, 5 Cal. App. 526, 90 Pac. 107.

12. Freitas v. Freitas, 31 Cal. App. 19, 159 Pac. 613; Gregory v. Clabrough's Exrs., 129 Cal. 475, 62 Pac. 72 (holding that the promise to pay on demand money paid under mistake of law is implied and that it is unnecessary to allege or prove it); McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761; San Gabriel Co. v. Witmer Bros. Co., 96 Cal. 623, 18 L. R. A. 465, 29 Pac. 500, 31 Pac. 588 (a count in assumpsit for money paid will be supported, since in such case the law implies a request on the part of the defendant and a promise to repay, and the plaintiff has the same right of action as if he had paid the money at the defendant's express request); Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137; De La Guerra v. Newhall, 55 Cal. 21; Abadie v. Carrillo, 32 Cal. 172; Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64 (complaint which avers substantially that the defendant was at a certain time indebted to the plaintiff in a certain sum for professional services rendered at the special instance and request of the defendant is sufficient without stating in terms the value of the services or that the defendant promised to pay); Preston v. Central Cal. etc. Irr. Co., 11 Cal. App. 190, 104 Pac. 462 (the consideration, request and promise are implied); Aydelotte v. Billing, 8 Cal. App. 673, 97 Pac. 698 (in an action for personal services performed for the defendant, it is unnecessary to find either upon a request for the services, or upon an agreement to pay the reasonable value thereof, each of which is a fact implied by law); Donegan v. Houston, 5 Cal. App. 526, 90 Pac. 107; Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985 (complaint in assumpsit for legal services which alleges that the services were performed at the special instance and request of the defendant, and states what they were reasonably worth, is not demurrable for not alleging that defendant promised to pay what the services were reasonably worth. See PLEADING; see, also, MONEY LENT; MONEY PAID; MONEY RECEIVED; SALES; WORK AND LABOR.

cipient that he will pay it, and that, too, without any previous request, a special request need not be stated or proved in the case of common counts for goods sold, work and labor, money lent, etc.[13]

§ 15. Failure to Set Forth Dates and Items of Indebtedness.—There is considerable authority to the effect that if a complaint stating a cause of action in assumpsit does not set forth specifically the dates and items of the indebtedness, the defendant may demand a bill of particulars. Such an omission is not, however, a proper subject of demurrer.[14] Accordingly, it has been ruled that it is not necessary to state when the plaintiff paid, laid out, expended, loaned or advanced to and for the defendant the moneys sued for, or when defendant requested plaintiff to make such payments, expenditures, loans or advancements.[15]

As affecting statute of limitations.—Following the general rule of pleading that a complaint is not demurrable

13. Quimby v. Lyon, 63 Cal. 394 (citing Chitty's Pleadings, 329–331). See MONEY RECEIVED.

14. Pike v. Zadig, 171 Cal. 273, 152 Pac. 923; Long Beach etc. Dist. v. Dodge, 135 Cal. 401, 67 Pac. 499; McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998; Farwell v. Murray, 104 Cal. 464, 38 Pac. 109; Rogers v. Duff, 97 Cal. 66, 31 Pac. 836; Wise v. Hogan, 77 Cal. 184, 19 Pac. 278; Kinkade v. Champion Horseshoe Co., 32 Cal. App. 435, 163 Pac. 228; Levi v. Sockolow, 32 Cal. App. 298, 162 Pac. 902. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 157, as to pleading items of account under Code Civ. Proc., § 454. See infra, § 18 et seq., as to joinder of counts. As to bills of particulars generally, see PLEADING.

15. Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998. See, also, Wetmore v. San Francisco, 44 Cal. 294 (holding that in an action to recover money, an allegation in counts in the ordinary common-law form of the precise day the money became due is not a material one, and the plaintiff may prove an indebtedness at the time of the institution of the suit). See, however, Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137 (declaring that where the complaint in an action for money paid does not state when the money was paid, it is demurrable on the ground of uncertainty in not stating the date or time of the issuable facts averred; but such objection cannot be taken advantage of upon a demurrer that the complaint is ambiguous, uncertain and unintelligible.

on the ground that the cause of action is barred by the statute of limitations unless it affirmatively appears from the face of the complaint that the action is so barred,[16] a complaint in assumpsit which does not state when the indebtedness was incurred is not demurrable on the ground that the cause of action is barred by the statute.[17] Nor is such a complaint demurrable on the ground that it is uncertain because it cannot be determined therefrom whether any portion of the claim is so barred.[18] But where the complaint shows on its face that the promise was made more than two years before the commencement of the action (that being the period of limitation applicable), the complaint is demurrable.[19]

§ 16. Defenses and Denials.—Where a complaint in an action to recover money due sets forth the common counts in the ordinary common-law form, the defendant, under an answer containing a general denial may prove payment, or that the plaintiff had transferred the demand to another person.[20] And in an action of assumpsit, payment may be proved under an answer denying that the defendant has not paid the plaintiff in full, or that there is now due from the defendant to the plaintiff any sum whatever, although the payment is not affirmatively averred.[1] But after an admission of the indebtedness charged in a complaint in assumpsit, a denial of the alleged promise to pay is immaterial, and raises no issue that requires proof on the part of the plaintiff, since from the indebtedness admitted the law implies a promise to pay.[2] And in an

16. See PLEADING; LIMITATION OF ACTIONS.

17. Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137.

18. McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761 (citing Wise v. Williams, 72 Cal. 544, 14 Pac. 204; and Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998).

19. Keller v. Hicks, 22 Cal. 457, 83 Pac. 78. See LIMITATION OF ACTIONS.

20. Wetmore v. San Francisco, 44 Cal. 294.

1. Mickle v. Heinlen, 92 Cal. 596, 28 Pac. 784. See PAYMENT.

2. Levinson v. Schwartz, 22 Cal. 229. See supra, § 14, as to pleading contract, promise, and consideration.

answer to a verified complaint in assumpsit a denial of the indebtedness merely, without a denial of the facts which show the existence of the indebtedness, is but a denial of a conclusion of law and raises no issue.[3] Moreover, a denial which involves a negative pregnant by declaring that the defendant is not indebted in the sum alleged in the complaint is insufficient, and may be taken as an admission of an indebtedness of any lesser amount.[4] While an answer may specifically take issue upon the indebtedness alleged in a common count, the defendant is not required to deny the plaintiff's allegations in any more specific language than that set forth in the complaint. In this respect there is no good reason for holding the defendant to a stricter rule of pleading than that allowed in favor of the plaintiff.[5]

§ 17. Special Contract as Evidence Under Common Counts.—If the plaintiff is entitled to bring his action upon a common count instead of declaring specially upon the express contract out of which his right to relief arose,[6] such contract, under the common count relied upon, may be admissible as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion.[7] And where the action was properly brought in the form of indebitatus assumpsit and not directly upon the contract

3. Wells v. McPike, 21 Cal. 215.

4. Higgins v. Wortell, 18 Cal. 330; Preston v. Central Cal. etc. Irr. Co., 11 Cal. App. 190, 104 Pac. 462 (citing Blankman v. Vallejo, 15 Cal. 638; Towdy v. Ellis, 22 Cal. 650). See PLEADING.

5. McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1090 (action for money had and received).

6. See supra, §§ 10–12.

7. Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; Reynolds v. Jourdan, 6 Cal. 108; San Joaquin Light & Power Co. v. Barlow, 30 Cal. App. Dec. 57, 184 Pac. 899 (holding that although letters received in evidence proved a contract price, they by virtue of that fact were also evidence tending to prove that the rate charged was reasonable); Breen v. Roy, 8 Cal. App. 475, 97 Pac. 170; De Boom v. Priestly, 1 Cal. 206. See EVIDENCE.

on account of the fact that the performance of the contract was prevented by the defendant,[8] the contract is admissible in evidence in such action, since it is the basis upon which the cause of action arose.[9] Likewise, although the plaintiff cannot recover upon the express contract where it is afterward deviated from by consent,[10] the measure of compensation must, nevertheless, be graduated by the terms of the contract, so far as the performance by the plaintiff can be traced under it.[11]

V. JOINDER OF CAUSES.

§ 18. In General.—In accordance with the general principle expressly declared by the code that several causes of action may be united in the same complaint where they all arise out of contracts express or implied,[12] a cause of action for a breach of an express contract and a cause of action on a common count may be united in the same complaint.[13] And in accordance with the principle that causes of action on implied contract may be joined in the same action,[14] two or more common counts may be declared upon in the same complaint.[15]

8. See supra, § 12.

9. Breen v. Roy, 8 Cal. App. 475, 97 Pac. 170.

10. See supra, § 11.

11. De Boom v. Priestly, 1 Cal. 206.

12. Code Civ. Proc., § 427, subd. 1. See ACTIONS, vol. 1, § 31 et seq.

13. Olmstead v. Dauphning, 104 Cal. 635, 38 Pac. 505; Cowan v. Abbott, 92 Cal. 100, 28 Pac. 213 (holding that in an action to recover for services rendered, where the complaint contains two counts, one upon an express contract and the other upon a quantum meruit, it is not error for the trial court to refuse to compel the plaintiff to elect upon which count of his complaint he will rely); Remy v. Olds, 88 Cal. 537, 26 Pac. 355; Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78 (holding that it is proper to unite in a suit upon a county warranty a count on the implied contract to repay, a count on liability as indorsers, and a count for money had and received. See, also, Hunt v. City of San Francisco, 11 Cal. 250 (holding that a default on a complaint containing special counts, defectively stated, and also the common counts in assumpsit, properly stated, will support a judgment; the default being a confession of the indebtedness for the causes and on the accounts alleged in the complaint.

14. See PLEADING.

15. Ransch v. Arp, 39 Cal. App. 580, 179 Pac. 694 (holding that

Pursuant to the rule stated, a cause of action for damages for several breaches of the terms of an express contract, and a cause of action on a quantum meruit for work and labor performed and materials furnished, may be united in the same complaint;[16] and a cause of action to recover back money paid by mistake of fact may be joined with a cause of action upon an express contract for the recovery of rent upon premises leased.[17] Moreover, in an action founded on contract, an answer which joins by way of counterclaim, causes of action for goods, wares and merchandise sold and delivered, for money paid, laid out and expended, and for money had and received, is not demurrable under the code, if such pleading would have been sufficient as a declaration at common law.[18]

§ 19. Pleading in Alternative Counts.—In accordance with the general rule that it is allowable to state a cause of action in the alternative, using different counts to meet any possible phase of the evidence,[19] a cause of action may be stated in alternative common counts.[20] And the plaintiff may set out a cause of action in the form of an

where the plaintiff joins a cause of action on an open book account with one for the value of the use of premises alleged to have been tortiously obtained, a special demurrer for misjoinder of causes of action is not good if it appears that the plaintiff is not suing for damages for the tortious taking of such premises). See, also, cases cited infra, § 19, to the rule that the plaintiff may plead in alternative common counts.

16. Remy v. Olds, 88 Cal. 537, 26 Pac. 355.

17. Olmstead v. Dauphiny, 104 Cal. 635, 38 Pac. 505.

18. Clay v. Carroll, 67 Cal. 19, 6 Pac. 874.

19. See PLEADING.

20. Lecke v. Hancock, 76 Cal. 127, 17 Pac. 937 (holding that where a complaint framed in accordance with the common counts clearly indicates that the same cause of action was stated in each count, findings for the plaintiff on one of the counts, without findings on the others, are sufficient to support a judgment in his favor). See, also, Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78 (holding that it is proper to unite in a suit upon a county warranty a count on the implied contract to repay, a count on liability as indorsers, and a count for money had and received).

action on a common count and also in the form of a count upon an express contract where there is a fair and reasonable doubt of his ability to plead them safely in one mode only.[1] Applying this rule, it has been determined that where, in an action for work and labor, the complaint contained two counts, one upon an agreement to pay an agreed price and the other upon the quantum meruit, and the plaintiff's counsel stated that the work mentioned in both counts was the same, it was not error for the trial court to deny the defendant's motion asking that the court require the plaintiff to elect on which count he would proceed to trial.[2]

§ 20. Joinder of Common Counts in One Count.—It has been declared that several distinct debts due in respect of different contracts not under seal, of the same or of a different nature, as demands for work and debts for goods, money lent, etc., might always be included under an indebitatus assumpsit count, and that the plaintiff would succeed pro tanto, though he only prove one of such contracts.[3] However, common counts cannot all be united in one count as one cause of action, without any specification of the sums due upon each several cause.[4] A complaint in an action of assumpsit to recover a specified sum on account of work done and labor performed, and on account of goods, wares and merchandise sold and delivered, is not subject to a demurrer for uncertainty upon the ground that the complaint does not state how much of the sum sued for was due for work and labor, and how much for goods, wares and merchandise. In such a case, if the defendant desires more particular information as to the items, he should demand a bill of par-

1. Wilson v. Smith, 61 Cal. 209. See, also, Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78 (decision noted supra, this section). See PLEADING.
2. Wilson v. Smith, 61 Cal. 209.
3. Donegan v. Houston, 5 Cal. App. 526, 90 Pac. 107 (quoting Chitty on Pleading).
4. Buckingham v. Waters, 14 Cal. 146.

ticulars.[5] But it has been held that a count is bad where it alleges that the defendant on a certain day, being indebted to the plaintiff in a certain sum, "money before that time laid out and expended, lent and accumulated, and had and received by the defendant, at his special instance and request, to the use of the plaintiff, then and there promised, etc."[6]

5. Farwell v. Murray, 104 Cal. 464, 38 Pac. 199. See PLEADING.

6. Buckingham v. Waters, 14 Cal. 146 (In this case, Baldwin, J., said: "Though we have recognized the use of the common counts, as proper in the practice in this state under our statute, we have never gone so far as to recognize such a jumble of all the causes of action in one count, as here illustrated; besides, the count itself seems to predicate the defendant's liability upon his own loan and expenditure of money").

(F. H. M.)

ASYLUMS.

See HOSPITALS AND ASYLUMS.

ATTACHMENT.

I. INTRODUCTORY.
II. BY AND AGAINST WHOM REMEDY MAY BE INVOKED.
III. ACTIONS IN WHICH REMEDY IS AVAILABLE.
IV. GROUNDS FOR ATTACHMENT.
V. PROCEEDINGS TO PROCURE ATTACHMENT.
VI. WRIT OF ATTACHMENT.
VII. PROCEEDINGS IN PRINCIPAL ACTION.
VIII. LIEN OF ATTACHMENT.
IX. PREVENTION OF ATTACHMENT.
X. RELEASE OF ATTACHMENT.
XI. DISCHARGE OR DISSOLUTION OF ATTACHMENT.
XII. INTERVENTION.
XIII. WRONGFUL ATTACHMENT.

I. Introductory.

1. Definition—Scope of Article.
2. Survey of California Law.
3. Nature of Remedy.
4. Purpose of Seizure.
5. Construction of Statutes.
6. Concurrence of Other Remedies.

II. By and Against Whom Remedy may be Invoked.

7. Persons Who may Invoke Remedy.
8. Persons Whose Property may be Attached Generally.
9. Partnerships.
10. Corporations.

Cases are cited in this article to and including 181 Cal., 1 Cal. App., and 195 Pac.

III. Actions in Which Remedy is Available.

11. In General.
12. Contract for Direct Payment of Money.
13. Contract Made or Payable in State.
14. Security for Debt in General.
15. Vendor's Lien.
16. Security Valueless.
17. Implied Contracts.
18. Damages for Breach of Contract.
19. Debt not Due.
20. Suits in Equity.

IV. Grounds for Attachment.

21. In General.
22. Nonresidence.

V. Proceedings to Procure Attachment.

IN GENERAL.

23. Jurisdiction of Court.
24. Defects and Irregularities in Proceedings.

AFFIDAVIT.

25. Initiation of Proceedings.
26. By Whom Made.
27. Formal Execution.
28. Knowledge or Information and Belief.
29. Recitals Generally.
30. Alternative and Disjunctive Statements.
31. Recital of Indebtedness in General.
32. Interest.
33. Setoffs and Counterclaims.
34. Conformity With Demand of Complaint.
35. Recital of Security.
36. Recital of Residence of Defendant.
37. Recital of Good Faith.
38. Amendments.

UNDERTAKING.

39. Undertaking in General.
40. In Action by Government.
41. Affidavit of Sureties.
42. Exception to and Justification of Sureties.

VI. Writ of Attachment.

43. Nature of Writ.
44. Issuance Generally.
45. Plural Writs.
46. Time of Issuance Generally.
47. Order of Issuance.
48. To Whom Directed—Contents.
49. Conformity With Complaint in Matter of Demand.
50. Conformity With Affidavit.
51. Defects and Irregularities—Amendment.
52. Return Generally.
53. Return as Evidence.

VII. Proceedings in Principal Action.

54. Character of Action—In Personam, in Rem.
55. Necessity for Jurisdiction of Defendant's Property.
56. Issuance and Service of Summons Generally.
57. Service by Publication.
58. Appearance by Defendant.
59. Allegations of Complaint—Prayer for Relief.
60. Misnomer and Nonjoinder of Parties.
61. Joinder of Several Causes.
62. Amendment of Complaint.
63. Judgment in General.
64. Judgment Against Nonresident.
65. Satisfaction of Judgment.
66. Effect of Judgment for Defendant.
67. Effect of Appeal.
68. Appellate Procedure.
69. Action to Set Aside Judgment.

VIII. Lien of Attachment.

IN GENERAL.

70. Nature and Creation.
71. Extent of Lien.
72. Effect of Transfer of Property After Levy.
73. Expiration and Continuance of Lien.
74. Abandonment of Lien.
75. Merger of Lien in Judgment.

PRIORITIES.

76. Between Attachments Generally.
77. Effect of Insufficiency of First Attachment.
78. Other Claims Generally.
79. Deeds.
80. Mortgages of Realty.
81. Chattel Mortgages.
82. Rights of Bailees and Pledgees.
83. Rights of Assignees.
84. Rights of Receivers.
85. Rights of Buyer and Seller of Personalty.
86. Unregistered Transfer of Corporate Stock.
87. Determination of Priority.

IX. Prevention of Attachment.

88. In General.
89. Liability of Sureties on Undertaking.
90. Pleading in Action on Undertaking.

X. Release of Attachment.

91. How Effected in General.
92. Release on Security.
93. Form of Undertaking.
94. Effect of Delivery of Undertaking.
95. Accrual of Liability of Obligors Generally.
96. Necessity of Demand.
97. Form of Demand.
98. Refusal of Defendant to Redeliver Property.

99. Pleading of Demand.
100. Return of Execution as Prerequisite to Action on Undertaking.
101. Effect of Premature Return.
102. Discharge of Obligors in General.
103. Discharge by Tender or Payment of Amount of Judgment.
104. Effect of Bankruptcy or Insolvency of Debtor.
105. Pleading in Action on Undertaking.
106. Measure of Liability of Obligors.
107. Assignment of Cause of Action Against Sureties.
108. Estoppels Arising from Execution of Undertaking.

XI. Discharge or Dissolution of Attachment.

109. What Operates to Dissolve Attachments Generally.
110. Insolvency.
111. Bankruptcy.
112. Death of Defendant.
113. Proceedings to Dissolve.
114. Grounds for Dissolution in General.
115. Insufficiency of Complaint.
116. Irregularities and Defects in Proceedings.
117. Evidence.
118. Appeal from Order Dissolving or Refusing to Dissolve.
119. Record on Appeal.
120. Review of Order on Appeal from Judgment in Principal Action.

XII. Intervention.

121. Right to Intervene.
122. Determination of Rights.
123. Pleading and Practice.

XIII. Wrongful Attachment.

124. Remedies—Elements of Cause of Action.
125. Accrual of Right of Action.
126. Pleading.
127. Damages Recoverable for Malicious Attachment.
128. Damages Recoverable in Action on Undertaking in General.
129. As Dependent upon Character of Property Seized.

I. INTRODUCTORY.

§ 1. Definition—Scope of Article.—Attachment is a remedy for the collection of a money demand, proceeding by a seizure, under legal process termed a writ of attachment, of the property of the person sought to be held liable.[1] It is not a distinct proceeding against the property seized, but is an adjunct or proceeding auxiliary to a main action which has for its purpose a determination of the justice of the plaintiff's demand.[2] It is, in effect, an incipient execution—an execution, so to speak, in advance of trial and judgment.[3] The property of the defendant having thus been levied upon, it is conserved for eventual execution after the principal action shall have proceeded to judgment, unless he procures its release by giving other security in the manner provided by the code.[4]

As thus defined, the subject of attachment is considered in the present article. Matters precedent to the issuance of the writ, the nature of the process and proceedings subsequent to the levy, are here discussed. Questions relating to the property subject to attachment, the making of the levy by the sheriff, the determination of third party claims, and the like, are, however, reserved for treatment in another article.[5] A closely allied subject is that which relates to the seizure of a debt owing by a third person to one who is made defendant in an action at law. Concerning this remedy no discussion is here attempted.[6] Nor

1. Code Civ. Proc., § 537; 2 Ruling Case Law, p. 800, § 1.

2. Porter v. Pico, 55 Cal. 165; Low v. Adams, 6 Cal. 277 (decided under the Practice Act); Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902; Bailey v. Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 316. See infra, § 3.

3. Porter v. Pico, 55 Cal. 165; Allender v. Fritts, 24 Cal. 447 (decided under the Practice Act); Foreign Mines Dev. Co. v. Boyes, 180 Fed. 594.

4. Porter v. Pico, 55 Cal. 165; Allender v. Fritts, 24 Cal. 447 (decided under the Practice Act); Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49 (decided under the Practice Act). See infra, §§ 91–108, as to release of property.

5. See LEVY AND SEIZURE, where execution cases are also treated.

6. See GARNISHMENT.

does the present article treat of the seizure of property under process issuing in actions against steamships, vessels and boats, as authorized by the Code of Civil Procedure, sections 813 to 827, inclusive;[7] or of the attachment of the person to compel attendance in legal proceedings.[8] And the attachment of trespassing animals is discussed under another title.[9] Proceedings in aid of attachment, such as creditors' bills,[10] actions to set aside fraudulent conveyances made for the purpose of defrauding creditors,[11] and injunctions,[12] are also treated elsewhere in this work.

§ 2. Survey of California Law.—The remedy of attachment as administered in the state of California was unknown to the common law. It derives its existence entirely from legislative enactment and has the scope, and only the scope, which the legislature has chosen to accord it.[13] The statutes now in force[14] are largely based upon those sections of the Practice Act which dealt with attachment. A number of their provisions are identical in force and effect with those of the earlier enactment, and, as a consequence, in many instances cases decided under the Practice Act are cited to propositions arising under the present practice. Due to the limited jurisdiction of justices' courts, certain sections have been enacted applying exclusively to attachments issued in actions in such courts.[15] In the main, however, the general provisions of the code apply to all attachments.[16]

7. See SHIPPING.

8. See WITNESSES.

9. See ANIMALS.

10. See CREDITOR'S SUIT.

11. See FRAUDULENT CONVEYANCES.

12. See INJUNCTIONS.

13. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1; Thornburgh v. Hand, 7 Cal. 554 (decided under the Practice Act); Foreign Mines Dev. Co. v. Boyes, 180 Fed. 594.

14. Code Civ. Proc., §§ 537–560, 866–869 (applying particularly to attachment in justices' courts).

15. Code Civ. Proc., §§ 866–868.

16. "The sections of this code from section five hundred and forty-one to section five hundred and fifty-nine, both inclusive, are applicable to attachments issued in justices' courts, the word 'constable' being substituted for the word 'sheriff,' whenever the writ is directed to a constable, and the

The cardinal rule of the law of attachment, based upon the fact that such proceedings are statutory and special, is to the effect that the provisions of the statute conferring the remedy must be strictly followed or no rights will be acquired thereunder.[17] It follows that the remedy will not be extended to cases not named in the statute.[18]

Those entitled under the statutes, and desiring to avail themselves of the remedy, must commence an action upon their demand, praying judgment as in other cases.[19] At the time of the issue of the summons, or at any time afterward, a writ of attachment will issue,[20] providing a proper affidavit[1] and undertaking[2] have been filed by the plaintiff. By virtue of the writ, property of the defendant may be seized and held pending the determination of the principal action, unless he has provided the security required by the code,[3] or otherwise affected a dissolution of the lien.[4] The judgment in the principal action, when rendered, does not differ from that entered in other cases upon a money demand,[5] but the

word 'justice' being substituted for the word 'judge.'" Code Civ. Proc., § 869.

17. Standard Auto Sales Co. v. Lehman, 30 Cal. App. Dec. 394, 186 Pac. 178; Sousa v. Lucas, 156 Cal. 460, 105 Pac. 413; Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 113 Am. St. Rep. 253, 83 Pac. 36; Beltaire v. Rosenberg, 129 Cal. 164, 61 Pac. 916; Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Maskell v. Barker, 99 Cal. 642, 34 Pac. 340; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; Gow v. Marshall, 90 Cal. 565, 27 Pac. 422; Hisler v. Carr, 34 Cal. 641; Wheaton v. Neville, 19 Cal. 41; Roberts v. Landecker, 9 Cal. 262; Thornburgh v. Hand, 7 Cal. 554; Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414; Griswold v. Sharpe, 2 Cal. 17; Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444, 115 Pac. 58; Drake v. De Witt, 1 Cal. App. 617, 82 Pac. 982.

18. See cases cited supra.

19. Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Allender v. Fritts, 24 Cal. 447 (decided under the Practice Act).

20. Code Civ. Proc., §§ 537, 866 (actions in justices' courts).

1. Code Civ. Proc., § 538.

2. Code Civ. Proc., §§ 539, 867 (actions in justices' courts).

3. See infra, §§ 88–90, as to prevention of attachment. See infra, §§ 91–108, as to release of attachment.

4. See infra, §§ 109–120, as to dissolution of attachment.

5. Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73;

manner of satisfaction is different, the plaintiff being entitled to immediate recourse to the attached property in preference to claims thereon intervening between the date of the levy and that of the judgment, instead of having to proceed by a general execution.[6]

Seeming conflicts between the provisions of the code and the decisions, and among the decisions themselves, are explained by the fact that subdivision 1 of sections 537 and 538 of the Code of Civil Procedure refer more particularly to residents, while subdivisions 2 and 3 of these sections expressly relate only to nonresidents.[7]

§ 3. Nature of Remedy.—Proceedings in attachment constitute the mode specified by the legislature by which a lien may be acquired upon the property of a debtor, resident or nonresident, against whom a cause of action exists arising out of contract;[8] or upon property of a nonresident against whom a cause of action lies to recover a sum of money as damages for injury to property within the state.[9] However, the creditor cannot claim as matter of right the benefit of an attachment, as something growing out of or necessarily connected with the contract, as he may the benefit of an action to recover his debt; for the attachment being merely an auxiliary to the action the legislature may give, withhold, or limit it, at pleasure, without impairing any substantial right of either party.[10] Moreover, an attachment is not necessarily a part of every action falling within the purview of section 537 of the Code of Civil Procedure. The remedy is provisional only, and is to be used by the creditor at his election to make

Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019. See infra, §§ 63, 64.

6. See infra, § 65, as to satisfaction of judgment for plaintiff.

7. Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 145 Pac. 734.

8. Code Civ. Proc., § 537, subds. 1, 2; Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

9. Code Civ. Proc., § 537, subd. 3.

10. Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49 (decided under the Practice Act). See supra, § 1.

the property of the debtor available for the execution of any judgment that may be obtained in the action.[11]

§ 4. Purpose of Seizure.—It is provided by section 537 of the Code of Civil Procedure that "the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered unless the defendant give security to pay such judgment. . . . ". This language shows clearly that the main object of the attachment law is to provide the plaintiff means whereby he may obtain security for his claim.[12] This is accomplished by the attachment holding the property until the judgment is rendered—and in case of real property, until the judgment is or may be docketed—so that the attached property may be taken and sold under an execution to be issued upon the judgment.[13] And as the only way in which the levying of the attachment upon the property operates as security for the satisfaction of the anticipated judgment is by its capacity to hold the property to await the execution to be issued, it is obvious that the right to hold property under attachment exists only when the property is subject to execution. Clearly, an attachment is not in the nature of a common-law distress, under which the defendant's property may be held until he pays the plaintiff's demand.[14]

In the case of actions against nonresidents, an attachment serves the double purpose of giving the court juris-

11. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019; In re Hall & Stilson Co., 73 Fed. 527.

12. Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318 (decided under the Practice Act); Low v. Adams, 6 Cal. 277 (decided under the Practice Act); In re Hall & Stilson Co., 73 Fed. 527.

13. Lehnhardt v. Jennings, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195. The following cases decided under the Practice Act are to the same effect: Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49; Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Low v. Adams, 6 Cal. 277.

14. Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49 (decided under the Practice Act).

diction to proceed, and of furnishing security for any judgment which the attachment plaintiff may recover.[15]

§ 5. Construction of Statutes.—Proceeding upon the theory that the remedy by attachment was unknown at common law, and is purely of statutory origin, and influenced by the further consideration that the remedy is harsh and extraordinary in its character, the courts are inclined to construe attachment statutes strictly in favor of those persons against whom they may be invoked.[16] But while the provisions of the statute in reference to this remedy must be strictly construed, they should be fairly interpreted, so as to give them a consistent and efficient operation in proper cases.[17] The sections of the code relating to attachments are all in pari materia, and are to be construed together in order to ascertain the intention of the legislature on any point in controversy.[18] And when the determination of a question of construction rests upon implication, that must be implied which will uphold, rather than that which will defeat, the purpose of the statute.[19] Thus where two sections have been enacted on the same day and are seemingly in conflict, the literal import of one cannot govern as against the evident intention of the legislature in enacting both.[20] The familiar principle for the interpretation of statutes which, "from the enumerated specification of certain particular ones, requires the exclusion of the consideration of other classes," applies to attachment laws. When the law, therefore,

15. Hanson v. Graham, 82 Cal. 631, 23 Pac. 56; Eck v. Hoffman, 55 Cal. 501.

16. Standard Auto Sales Co. v. Lehman, 30 Cal. App. Dec. 394, 186 Pac. 178; Ayres v. Burr, 132 Cal. 125, 64 Pac. 120; Foreign Mines Dev. Co. v. Boyes, 180 Fed. 594 (quoting from Waples in Attachment and Garnishment).

17. Lick v. Madden, 25 Cal. 202 (construing the Practice Act); Roberts v. Landecker, 9 Cal. 262 (construing the Practice Act).

18. Lick v. Madden, 25 Cal. 202 (construing the Practice Act); Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786.

19. Lick v. Madden, 25 Cal. 202 (construing the Practice Act).

20. Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786 (construing Code Civ. Proc., §§ 553 and 946).

designates and specifies in what instances an attachment may issue and in what cases it is not a legal remedy, the express will of the legislature must control.[1]

§ 6. Concurrence of Other Remedies.—In some instances a creditor, for the satisfaction of one debt, may pursue at the same time several remedies which are not substantially the same in their nature and effect, as a proceeding against property and a proceeding against the person, or two proceedings against different properties or things, although he can have but one satisfaction. A resort to several remedies may be necessary to obtain full satisfaction, and being consistent with each other and with the purpose of satisfaction, the pursuit of one of them cannot be construed as being a waiver of others.[2] Accordingly, a creditor may proceed against his debtor by attachment and by enforcing a mechanic's lien which exists in his favor; and the pursuit of the concurrent remedy does not imply an intention to waive or abandon the lien, and does not discharge it. The two remedies are cumulative.[3] On the other hand, in so far as inconsistent remedies are concerned, resort to attachment proceedings will operate as a bar to the selection of an incompatible remedy, so long as the attachment lien is relied upon.[4] Thus where a common carrier having a lien against property for freight sues out and procures to be levied a writ of attachment, he thereby abandons and forfeits his lien, and subsequently, when the attachment proves unavailing, he cannot fall back upon it.[5]

An exception to the general rule that a creditor must reduce his claim to judgment before he is entitled to any

1. Standard Auto Sales Co. v. Lehman, 30 Cal. App. Dec. 394, 186 Pac. 178. See STATUTES.

2. As to remedies generally, see ACTIONS, vol. 1, p. 381.

3. Code Civ. Proc., § 1197; Brennan v. Swasey, 16 Cal. 140 (decided under the Practice Act). See MECHANICS' LIENS.

4. Roberts v. Landecker, 9 Cal. 262 (decided under the Practice Act).

5. Wingard v. Banning, 39 Cal. 543 (decided under the Practice Act). See CARRIERS.

relief in equity occurs when it is only by means of equitable intervention that an attaching creditor can preserve his security until he can reduce his claim to judgment.[6] Thus it has been held that a court of equity will take jurisdiction of a bill for an injunction filed by attaching creditors of an insolvent, to restrain proceedings on execution against the goods attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted.[7] It is obvious, though, that this exception extends only to cases in which personal property has been attached. A creditor who has merely levied an attachment upon real property as the property of his debtor, subsequent to the date of an alleged fraudulent conveyance made by the debtor, cannot, prior to the rendition of a judgment against the debtor, maintain an action in equity to set aside the conveyance.[8]

II. By and Against Whom Remedy may be Invoked.

§ 7. Persons Who may Invoke Remedy.—Although by the amendment of section 537 of the Code of Civil Procedure in 1905,[9] the remedy of attachment is made available to one having a cause of action against a nonresident for damages arising from an injury to property within the state, the attachment law is designed primarily for the benefit of creditors—creditors whose claims are liquidated.[10] And since an attachment is nothing more than

6. Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669. The following cases, decided under the Practice Act, are to the same effect: Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605; Scales v. Scott, 13 Cal. 76; Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519.

7. Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519 (decided under the Practice Act).

8. Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669. See CREDITORS' SUIT.

9. Stats. 1905, p. 433.

10. Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64; Hathaway v. Davis, 33

a remedy in aid of an ordinary action,[11] there seems to be no reason why a nonresident who is entitled to maintain an action in the courts of the state may not invoke such remedy the same as a citizen.[12] Hence it may be stated that as a general rule any person standing in the position of a creditor and having a claim satisfying the requirements of subdivisions 1 or 2 of section 537 of the Code of Civil Procedure may invoke the remedy. Thus a director of a corporation, or one occupying a similar fiduciary relation, who is also a creditor, is not precluded from enforcing the rights which he would have if he occupied the status of creditor alone, but he may bring an adversary action against the corporation, levy an attachment, and avail himself of the rights of priority secured by the attachment as against subsequent lienors.[13] And upon the death of the member of a beneficiary order, the beneficiary under the certificate of membership becomes a creditor of the order, and in an action against it may attach a fund belonging thereto in this state.[14] Likewise it has been held that a defendant in interpleader who has filed a cross-complaint is entitled to have a writ of attachment issued against the subject matter of the controversy.[15]

§ 8. Persons Whose Property may be Attached Generally.—The attachment law is directed principally against debtors. It is as effective against artificial as it is against natural persons,[16] and in so far as the right to attach is concerned, it matters not that the debtor is insolvent and that the creditor is aware of the fact.[17] The

Cal. 161 (construing the Practice Act).

11. See supra, §§ 1, 3.

12. 2 Ruling Case Law, p. 809, § 8.

13. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

14. Lackmann v. Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583.

15. Interlocking Stone Co. v. Scribner, 19 Cal. App. 344, 126 Pac. 178.

16. Winrod v. Wolters, 141 Cal. 399, 74 Pac. 1037. See infra, § 11.

17. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

creditor's rights under the attachment, however, may be defeated by a subsequent discharge of the debtor in bankruptcy or insolvency.[18] The residence of the debtor is immaterial when the cause of action falls within subdivision 1 of section 537 of the Code of Civil Procedure, though subdivision 2 of that section applies only to nonresidents.[19] Indorsers, guarantors, sureties and all others who undertake to pay or become responsible for the debts of another fall within the purview of both of these subdivisions.[20] It has been decided, however, that an attachment will not issue against a trustee as such, for he has no attachable interest in the trust property.[1] Under subdivision 3 of section 537 of the Code of Civil Procedure, attachment will issue against a nonresident against whom a cause of action lies for injuries to property within the state.

§ 9. **Partnerships.**—Partnerships are liable to attachments in the same manner as are individual debtors, so long as the legal title of the firm property remains in the copartners.[2] And a creditor of an individual partner may levy an attachment upon his interest in the partnership.[3] Moreover, the filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and the appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution.[4] But an attaching creditor who has levied

18. See infra, §§ 110, 111.

19. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 Pac. 780; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

20. Hathaway v. Davis, 33 Cal. 161 (decided under similar provisions of the Practice Act).

1. Ward v. Waterman, 85 Cal. 488, 24 Pac. 930. See TRUSTS.

2. Briody v. Conro, 42 Cal. 135 (decided under the Practice Act): Stokes v. Stevens, 40 Cal. 391 (decided under the Practice Act).

3. Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101.

4. Adams v. Woods, 9 Cal. 24 (decided under the Practice Act).

upon the interest of an individual partner in the firm assets has no right to delay an action to wind up the affairs of the partnership until the recovery of judgment in the attachment suit. And if the partners have conspired to defeat the attachment suit, the resistance to such conspiracy must be made in that suit, and not by intervention in the suit to settle the partnership.[5] No attachment can be sued out by one partner against another for any matter touching the partnership affairs.[6] Nor can a member of a partnership or his assignee resort to attachment for the enforcement of an individual claim against the firm when there has been no final settlement of the partnership accounts;[7] though of course a former partner may attach the property of his associate after a dissolution of the partnership.[8]

§ 10. **Corporations.**—According to the general rule, corporations organized for private purposes are liable to attachment even though they are insolvent.[9] National banks, however, are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action except so far as the law-making power of the government may permit.[10] Pursuant to its authority in this respect, Congress has enacted a statute which in terms forbids the issuing of an attachment, injunction or execution against a national bank be-

5. Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101.

6. Wheeler v. Farmer, 38 Cal. 203 (decided under the Practice Act).

7. Bullard v. Kinney, 10 Cal. 60 (decided under the Practice Act).

8. Strong v. Stapp, 74 Cal. 280, 15 Pac. 835. See PARTNERSHIP.

9. Bories v. Union Bldg. etc. Assn., 141 Cal. 74, 74 Pac. 552 (holding that building and loan associations form no exception to the rule).

10. Dennis v. First Nat. Bank of Seattle, 127 Cal. 453, 78 Am. St. Rep. 79, 59 Pac. 777; Van Reed v. People's Nat. Bank, 198 U. S. 554, 3 Ann. Cas. 1154, 49 L. Ed. 1161, 25 Sup. Ct. Rep. 755, see, also, Rose's U. S. Notes.

fore final judgment in any suit, action or proceeding in any state, county or municipal court.[11] The supreme court of the United States has held that although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency; that the remedy is taken away altogether,[12] "and all of the attachment laws of the states must be read as if they contained a proviso in express terms that they were not to apply to suits against national banks."[13] By a statute formerly in force in California, insolvent state banks were exempted from the operation of the attachment law.[14]

III. ACTIONS IN WHICH REMEDY IS AVAILABLE.

§ 11. In General.—It is provided by section 537 of the Code of Civil Procedure that attachment will lie,

"1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless. 2. In an action upon a contract, express or implied, against

11. National Banking Act, June 3, 1864, § 57, as amended March 3, 1873, U. S. Rev. Stats., § 5242.

12. Van Reed v. People's Nat. Bank, 198 U. S. 554, 3 Ann. Cas. 1154, 49 L. Ed. 1161, 25 Sup. Ct. Rep. 775, see, also, Rose's U. S. Notes; Dennis v. First Nat. Bk. of Seattle, 127 Cal. 453, 78 Am. St. Rep. 79, 59 Pac. 777.

13. Butler v. Coleman, 124 U. S. 721, 31 L. Ed. 567, 8 Sup. Ct. Rep. 718, see, also, Rose's U. S. Notes (quoted and followed in Dennis v. First Nat. Bank of Seattle, 127 Cal. 453, 78 Am. St. Rep. 79, 59 Pac. 777).

14. Crane v. Pacific Bank, 106 Cal. 64, 27 L. R. A. 562, 39 Pac. 215 (decided under the Bank Commissioners' Act of 1878, Stats. 1877–78, p. 740; repealed 1903, p. 73). See BANKS.

a defendant not residing in this state. 3. In an action against a defendant, not residing in this state, to recover a sum of money as damages, arising from an injury to property in this state, in consequence of negligence, fraud, or other wrongful act."

Subdivision 3 of this section as quoted above was added in 1905, and clearly authorizes attachment to issue in a certain class of actions against nonresidents which sound in tort. While it cannot be disputed that prior to this amendment the language of the section limited attachment to actions arising on contracts express or implied for the recovery of money only, and, as declared by the courts, left no room for using it in actions founded in tort,[15] it is difficult to reconcile decisions rendered subsequent to this amendment and enunciating the same rule,[16] with the provisions of the section as it now stands, except on the ground that they were decided under subdivision 1, which, it is well settled, governs attachments against residents,[17] and that they refer only to such attachments.

Actions in justice's court.—A writ of attachment may issue in an action in a justice's court in which the sum claimed, exclusive of interest, exceeds ten dollars.[18]

Criminal actions.—Upon the filing of the information of complaint in an action by the state against a violator of the lottery law, the clerk of the court, or if the suit be in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information as being offered for disposal in lottery, and therefore forfeited to the state. Such an attachment has the

15. Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Babcock v. Briggs, 52 Cal. 502 (action to recover from the defendants money which the plaintiffs intrusted to their clerk, and which the defendants won from him in gambling); Griswold v. Sharpe, 2 Cal. 17 (action brought under Practice Act for damages for injuries received in collision between vessels).

16. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 Pac. 780; Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1.

17. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

18. Code Civ. Proc., § 866.

same force and effect against the property and is issued in the same manner as attachments issued from the district courts in civil cases.[19]

§ 12. Contract for Direct Payment of Money.—Subdivision 1 of section 537 of the Code of Civil Procedure, which, it is agreed by the authorities, controls attachment against resident debtors,[20] provides among other requirements that the contract sued upon must be one "for the direct payment of money" in order for the action to support an attachment. This language is obscure and uncertain, it has been said, and it is impossible, from the subdivision standing alone, to determine just what the intent of the legislature was. However, construing it in connection with subdivision 1 of section 538 of the same code, which requires the plaintiff to be able to swear that the defendant is indebted to him in a certain sum, specifying the amount, the court has come to the conclusion that by the use of the word "direct," the legislature intended merely to exclude causes of action for unliquidated sums of money,[1] and not to exclude collateral contracts, for a collateral contract or promise may be "for the direct payment of money" as well as the principal promise.[2] Although this construction of the statute confines the right of the creditor to attachment to cases in which the liability of the defendant can be ascertained with certainty, it is not essential that

19. Pen. Code, § 325. See infra, §§ 44–47, as to issuance of writ.

20. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976 (holding that attachment will not issue in an action for damages for breach of a contract to deliver personalty). See cases cited supra, § 11.

1. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976; Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64 (quoting with approval from Hathaway v. Davis, 33 Cal. 161, in which the court construed the Practice Act).

2. County of Monterey v. McKee, 51 Cal. 255; McKee v. Monterey County, 51 Cal. 275; San Francisco v. Brader, 50 Cal. 506; Hathaway v. Davis, 33 Cal. 161 (decided under the Practice Act); Tyson v. Reinecke, 25 Cal. App. 696, 145 Pac. 153.

the contract specify the precise amount to be paid. It is sufficient that the contract furnishes the measure of liability or the information from which the amount due can be ascertained.[3]

In the application of this rule of construction it is held that a bail bond,[4] an official bond,[5] an appeal bond,[6] and a contract of guaranty,[7] are contracts "for the direct payment of money." Likewise, an action against a stockholder to recover unpaid installments upon a subscription to the stock of a corporation;[8] or to recover his proportion of a debt of the corporation,[9] is one upon a contract "for the direct payment of money." And the same is true of an action by a county to recover a license tax.[10] But an action to recover money due upon a statutory liability merely, which exists without the assent of the one liable, is not founded upon a contract "for the direct payment of money" within the meaning of the statute.[11]

3. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64; Hathaway v. Davis, 33 Cal. 161 (decided under the Practice Act); Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 145 Pac. 734 (action to recover commissions due on contract for sale of goods).

4. San Francisco v. Brader, 50 Cal. 506.

5. County of Monterey v. McKee, 51 Cal. 255.

6. Hathaway v. Davis, 33 Cal. 161 (decided under the Practice Act).

7. Tyson v. Reinecke, 25 Cal. App. 696, 145 Pac. 153.

8. Flagg v. Dare, 107 Cal. 482, 40 Pac. 804; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Lankershin Ranch Land etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

9. Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846 (holding that such an action is none the less based upon contract because under the provisions of section 3 of article XII of the constitution of the state and under section 322 of the Civil Code the stockholder is made liable to perform the contract in part).

10. San Luis Obispo County v. Greenberg, 120 Cal. 300, 52 Pac. 797.

11. Talcott Land Co. v. Hershiser, 61 Cal. Dec. 126, 195 Pac. 653 (action by corporation under section 309 of the Civil Code as amended in 1917 to recover from former directors its entire capital alleged to have been wrongfully divided among its stockholders); McCusker v. Walker, 77 Cal. 208, 10 Pac. 382; Walker v. McCusker, 65 Cal. 360, 4 Pac. 206 (holding that an attachment will not issue in an action by a purchaser to re-

§ 13. Contract Made or Payable in State.—Under subdivision 1 of section 537 of the Code of Civil Procedure, in order for attachment to lie in an action upon a contract, it must appear not only that the contract is one "for the direct payment of money,"[12] but also that "the contract is made or is payable in this state."[13] Moreover, if a contract is not made in this state, it must contain an express stipulation that it shall be paid in this state, in order to authorize the issuance of an attachment in an action upon it.[14] A contract for the payment of money made in another state is presumptively to be performed there, and whatever may have been the understanding of the parties as to the place of payment, they are concluded by the terms of their written contract, and the legal presumptions attaching thereto whenever the attachment laws of the state are invoked.[15] The rule holds although it may be true, in a general sense, that the money is payable wherever the debtor may be found.[16] A subsequent promise that payment shall be made within this state cannot affect the question in any manner when the suit is brought upon the original contract.[17] And

cover of a tenant in possession rents for use and occupation from the day of sale to the expiration of the time for redemption).

12. See supra, § 12.

13. Beltaire v. Rosenberg, 129 Cal. 164, 61 Pac. 916; Dulton v. Shelton, 3 Cal. 206 (decided under the Practice Act).

14. Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863; Eck v. Hoffman, 55 Cal. 501; Dulton v. Shelton, 3 Cal. 206 (decided under the Practice Act); Erickson v. Erickson, 32 Cal. App. Dec. 117, 190 Pac. 464 (holding that a suit upon a judgment rendered in another state is not one based upon a contract which "is made or is payable in this state"); Atwood v. Little Bonanza etc. Co., 13 Cal. App. 594, 110 Pac. 344; Drake v. De Witt, 1 Cal. App. 617, 82 Pac. 982.

15. Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863; Atwood v. Little Bonanza etc. Co., 13 Cal. App. 594, 110 Pac. 344. See CONTRACTS; NEGOTIABLE INSTRUMENTS.

16. Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863; Atwood v. Little Bonanza etc. Co., 13 Cal. App. 594, 110 Pac. 344 (holding that section 3100 of the Civil Code, which provides that a negotiable instrument which does not specify a place of payment is payable wherever the debtor is found, is inapplicable to attachments).

17. Dalton v. Shelton, 3 Cal. 206 (decided under the Practice Act).

where a contract is made and is payable out of this state, the requirements of the attachment law cannot be evaded or annulled by the creditor sending to his debtor in this state a note or memorandum of the amount due, and thereupon, in case the claim is not disputed, commencing proceedings in attachment as upon a new contract made in this state.[18]

§ 14. Security for Debt in General.—In addition to the limitations set out above,[19] subdivision 1 of section 537 of the Code of Civil Procedure specifies that attachment will not lie unless the contract sued upon is "not secured by any mortgage or lien upon real or personal property, or any pledge of personal property," or, if originally so secured, unless "such security has, without any act of the plaintiff or the person to whom the security was given, become valueless."[20] Obviously, the policy of the law is that a creditor holding security of the kind denominated shall not resort to the summary process of attachment until he has exhausted such security,[1] and when a creditor has that security, no attachment will issue.[2] It matters not whether the lien is one recognized by courts of equity or is one of statutory origin and resting in contract;[3] nor should inquiry be made as to the value of the lien or its sufficiency to cover the amount of the claim it

18. Beltaire v. Rosenberg, 129 Cal. 164, 61 Pac. 916.

19. See supra, §§ 12, 13.

20. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

1. Porter v. Brooks, 35 Cal. 199 (decided under section 120 of the Practice Act); Hill v. Grigsby, 32 Cal. 55 (decided under section 120 of the Practice Act).

2. Lankershin Ranch Land & Water Co. v. Herberger, 82 Cal. 600, 23 Pac. 134; Beaudry v. Vache, 45 Cal. 3 (stock of an association held as collateral); Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318 (decided under section 120 of the Practice Act); Foreign Mines Dev. Co. v. Boyes, 180 Fed. 594 (action to enforce the defendant's liability as a stockholder upon notes given by the corporation which were secured by mortgage).

3. Hill v. Grigsby, 32 Cal. 55 (decided under the Practice Act).

was intended to secure.[4] And the fact that the lien is upon property outside of the state carries no weight. A lien is none the less a security because the property covered by it is without the jurisdiction of the courts of this state, and it may be equally or more valuable to the creditor there than it would be if the property were in this state.[5] But, to prevent the issuance of an attachment, the security must be of fixed determinate character, unconditional and capable of being enforced with certainty;[6] and of one of the kinds specified.[7] The law does not provide, however, that no attachment shall issue where the plaintiff has other security for the claim. It merely designates the specific kinds of security that will bar the remedy.[8]

§ 15. Vendor's Lien.—It is settled beyond contravention that under an executory contract for the sale of real property, where the vendor retains title to the property until all payments are made, he has security for the purchase price, within the meaning of subdivision 1 of section 537 of the Code of Civil Procedure, and is therefore not entitled to an attachment in an action to recover an unpaid balance on the contract.[9] And the assignee of notes given for such purchase money is entitled to the security, as an incident to the debt, and cannot attach property thereupon, without showing that the security has

4. Beaudry v. Vache, 45 Cal. 3 (decided under section 120 of the Practice Act).

5. Hill v. Grigsby, 32 Cal. 55 (decided under the Practice Act).

6. Porter v. Brooks, 35 Cal. 199 (decided under the Practice Act).

7. Bank of California v. Boyd, 86 Cal. 386, 25 Pac. 20; Graham v. Annis, 28 Cal. App. 754, 153 Pac. 981 (claim secured by mechanic's lien under section 813 of the Code of Civil Procedure); Slosson v. Glosser, 5 Cal. Unrep. 460, 46 Pac. 276 (debt secured by bond).

8. Standard Auto Sales Co. v. Lehman, 30 Cal. App. Dec. 394, 186 Pac. 178.

9. Gessner v. Palmateer, 89 Cal. 89, 13 L. R. A. 187, 24 Pac. 608, 26 Pac. 789; Porter v. Brooks, 35 Cal. 199 (decided under the Practice Act); Hill v. Grigsby, 32 Cal. 55 (decided under the Practice Act); Richvale Land Co. v. Johnson, 28 Cal. App. 296, 152 Pac. 312.

become valueless.[10] This rule does not apply, however, to cases in which the vendor has passed title to the vendee. In such an instance the vendor has at most only an equitable right to resort to the land for payment, which right is liable to be defeated by an alienation or encumbrance. And if the vendee has made a conveyance, it is not incumbent upon the vendor to go through a litigation with the purchaser in order to ascertain whether he is a purchaser for value without notice, before resorting to his attachment.[11]

The rule is also different with regard to sales of personal property, and the mere fact that the vendor retains the title to the property sold will not preclude him from attaching in an action to recover the purchase price. The difference between the two kinds of property is the reason for the difference in the rule applicable to each in the case of executory contracts of sale. Real property is fixed and cannot be destroyed, lost, stolen or taken away. And the vendor therefore always has his security for the payment of the balance of the purchase price; while personal property may be taken away or stolen or destroyed with the consequent loss of his security and without the knowledge of the vendor. Furthermore, a vendor of personalty retaining the title under an executory contract of sale and passing possession has neither a lien nor a mortgage as security, but only the bare legal title and the buyer's promise to pay. Under the law a vendor's lien does not exist as to personal property independent of possession,[12] and by the terms of the contract the vendor remains the owner of the property, and this necessarily precludes the condition that he could be a mortgagee.[13]

10. Gessner v. Palmateer, 89 Cal. 89, 13 L. R. A. 187, 24 Pac. 608, 26 Pac. 789.

11. Porter v. Brooks, 35 Cal. 199 (decided under the Practice Act).

12. Civ. Code, § 3049; Standard Auto Sales Co. v. Lehman, 30 Cal. App. Dec. 394, 186 Pac. 178; Fads v. Kessler, 121 Cal. 244, 53 Pac. 656. See SALES.

13. Civ. Code, § 2920; Standard Auto Sales Co. v. Lehman, 30 Cal. App. Dec. 394, 186 Pac. 178.

§ 16. Security Valueless.—By subdivision 1 of section 537 of the Code of Civil Procedure, the plaintiff is entitled to a writ of attachment, although the contract sued upon was originally secured by a mortgage or lien on or pledge of property, if "such security has, without any act of the plaintiff or of the person to whom the security was given, become valueless."[14] It has been declared that this subdivision has no application to a case where the security was originally valueless or inadequate, and has not changed in value; that having elected to take security of no value, the creditor is thereby concluded in his rights.[15] The better view, though, would seem to be that if the security given was, at the time of delivery, valueless, and has ever since remained valueless, there is no contract of security; that no property in truth was hypothecated or pledged, and that the creditor stands in precisely the position as would one whose debtor had made no pretense of securing the debt.[16]

The language used in this subdivision is not to be construed as meaning that the property pledged must itself have become valueless before the plaintiff can have an attachment, but that the property pledged has ceased to have any value as a security, and, if the property has been disposed of in accordance with the very terms under which it was given and held as a security, the "security" has ceased to exist, and is therefore valueless. And where property pledged as security for a debt has been sold pursuant to the authority given by the pledgor to the pledgee, and the net proceeds applied upon a debt, the security has become valueless as a security by the direction and authority of the pledgor, and not by the act of the pledgee, within the meaning of the statute, and an attachment will

14. Williams v. Hahn, 113 Cal. 475, 45 Pac. 815 (pledge of personal property); Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086 (debt secured by mortgage).

15. Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086.

16. McPhee v. Townsend, 139 Cal. 638, 73 Pac. 584 (citing Powell v. Patison, 100 Cal. 236, 34 Pac. 677).

lie in an action to recover the remainder of the debt.[17] Lapse of time is not sufficient to authorize an attachment where a mortgage has been given to secure the payment of the indebtedness on which the action is brought. It cannot be assumed that the statute of limitations would be pleaded in action to enforce the security, nor could the statute have run without any fault on the part of the creditor.[18]

§ 17. Implied Contracts.—It is expressly provided by section 537 of the Code of Civil Procedure that attachment will issue in an action upon an implied contract "for the direct payment of money,"[19] or, in the case of a defendant not residing in the state, in an action upon any implied contract.[20] Where a common count will lie, the law implies, as a fiction which cannot be controverted, a promise or contract to pay the amount recoverable in such an action. Consequently, the issuing of an attachment in such a case will be sustained upon the strength of the promise or contract so implied.[1] An action to recover a sum of money which has been paid upon a consideration which has entirely failed falls within this class of cases.[2] The same is true of an action by a principal against an agent to recover a specific amount received by the agent to the use of the principal, and the right of the principal in such a case will not be defeated merely because in addition to praying judgment for specified amount the complaint contains a further prayer for equitable relief for an

17. Williams v. Hahn, 113 Cal. 475, 45 Pac. 815.

18. Page v. Latham, 63 Cal. 75.

19. Subd. 1.

20. Subd. 2.

1. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976. See note, 8 California Law Review, 250, for a discussion of this principle. See ASSUMPSIT.

2. Lathrop v. Francis, 180 Cal. 182, 180 Pac. 1; S. C. V. Peat Fuel Co. v. Tuck, 53 Cal. 304; Ralphs v. Bruns, 22 Cal. App. 153, 133 Pac. 997 (holding that an action for the cancellation of a deed and an assignment of a mortgage, alleged to have been procured by fraud, is not an action which comes under section 537 of the Code of Civil Procedure).

accounting for other moneys received by the agent which were unknown to the principal.[3] An action in the nature of a common-law action of trespass on the case for damages for deceit is not one upon an implied contract for the direct payment of money within the meaning of subdivision 1.[4]

§ 18. Damages for Breach of Contract.—An attachment will lie upon a cause of action for damages for a breach of contract, where the damages are readily ascertainable by reference to the contract, and proof of what was done under it, and the basis of computation of damages appears to be reasonable and definite.[5] While it is true that under subdivision 2 of section 537 of the Code of Civil Procedure this rule is applicable in case of an action against a nonresident for the breach of any contract,[6] in the case of residents, under subdivision 1 of the same section, the action must be based upon a breach of a contract for the direct payment of money; if the defendant has contracted to do something else than pay money, attachment will not issue.[7] It is no exception to this last proposition that an attachment will issue in an

3. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

4. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1.

5. California Packing Corp. v. Kato, 31 Cal. App. Dec. 180, 188 Pac. 57; Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64; Donnelly v. Strueven, 63 Cal. 182; Hamburger v. Halperm, 28 Cal. App. 317, 152 Pac. 61 (action to recover, in the form of damages for breach of contract, commissions which the plaintiff would have earned had the contract not been broken by the defendant).

6. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 145 Pac. 734.

7. California Packing Corp. v. Kato, 31 Cal. App. Dec. 180, 188 Pac. 57 (action for breach of contract to deliver goods); Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976 (action for breach of contract to deliver personal property); Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969; King v. Cline, 33 Cal. App. Dec. 416, 194 Pac. 290 (action for damages contingent upon an employee failing to ful-

action to recover as damages for breach of contract a certain sum of money paid upon a contract the consideration of which has wholly failed. In such a case, the action is based upon a contract implied by law that the defendant will refund the money so paid.[8] The amount actually due under the contract is sufficiently shown, for the purposes of the attachment, when the complaint alleges precisely what the damages are, and the affidavit in attachment states that the defendant is indebted to the plaintiff in the same amount, upon a contract for the direct payment of money.[9] It is immaterial that plaintiff has also demanded in the complaint other sums which are not liquidated.[10] Section 427 of the Code of Civil Procedure authorizes a plaintiff to unite in his complaint several causes of action, where they all arise out of contracts; and under this section he may unite with a cause of action upon a contract for the direct payment of money another cause of action arising out of contract wherein the damages for its breach are unliquidated, and for which he is not entitled to a writ of attachment.[11]

§ 19. Debt not Due.—There is a conflict of authority as to the effect of an attachment which is issued in an action upon a demand not yet matured. It has been held, in accord with the rule generally recognized in other jurisdictions, that such an attachment is unwarranted, and is a fraud upon the rights of such creditors as are injured by it, and consequently void as to them.[12] In application

fill his contract with his employer). See note, 8 California Law Review, 251, for a discussion of this proposition.

8. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238; Santa Clara Valley Peat Fuel Co. v. Tuck, 53 Cal. 304. See supra, § 18.

9. Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64.

10. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238.

11. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732. As to joinder of causes of action, see ACTIONS, vol. 1, p. 345 et seq.

12. Kinsey v. Wallace, 36 Cal. 462; Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184; Taaffe v. Josephson, 7 Cal. 352 (these cases were decided under the Practice Act).

of the rule, an attachment would be void in toto though a portion of the creditor's claim was actually due.[13] This strict rule has not been always recognized, and by some cases such attachments are regarded as being only prima facie void as against subsequent creditors,[14] the validity of the attachment being tested by the presence or absence of actual fraud.[15] Under this latter rule, if a debt has been contracted fraudulently, the creditor may attach before maturity, and other creditors subsequently attaching cannot complain that the suit was prematurely brought. The debt in such case is equitably due, and there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself.[16] Similarly, although the whole of the debt on which an attachment was issued was not due when the suit was commenced, a subsequent attaching creditor cannot by intervention altogether postpone the lien of the first attachment to his own, unless the plaintiff in the first action fraudulently commenced his action. The prior lien of the plaintiff in such a case should be reduced only to the amount which was due at the date of his attachment.[17]

§ 20. Suits in Equity.—The law is unsettled on the question of whether or not attachment will issue in suits in equity. Following the rule that statutes conferring the remedy of attachment must be strictly construed,[18] the court has stated in no uncertain terms that section 537 of the Code of Civil Procedure does not grant a writ of

13. Taaffe v. Josephson, 7 Cal. 352 (in this case suit was brought on four promissory notes, one of which was not due).

14. Patrick v. Montader, 13 Cal. 434 (decided under the Practice Act).

15. J. H. Coghill & Co. v. Marks, 29 Cal. 673 (decided under the Practice Act); Patrick v. Montader, 13 Cal. 434 (decided under the Practice Act).

16. Patrick v. Montader, 13 Cal. 434 (decided under the Practice Act).

17. J. H. Coghill & Co. v. Marks, 29 Cal. 673 (decided under the Practice Act).

18. See supra, § 5.

attachment where equitable relief as such is sought.[19] On the other hand, it has been declared that inasmuch as this section does not in terms prescribe that the action must be one in law, or that it may not be one in equity, or that it may not be one of either law or equity, or of both, it is not necessary, in order to uphold a writ of attachment, to establish the proposition that the action is either legal or equitable; that it is immaterial whether the action is strictly legal or strictly equitable.[20] In any event, it is well established that merely because an action addresses itself to both the legal and equitable powers of the court, that circumstance will not operate to deny the plaintiff a writ of attachment if in other respects the pleadings warrant it.[1] This does not mean, however, that an attachment may be issued upon a creditor's bill to set aside transfers of property in fraud of creditors. Such an action does not fall within the scope of section 537 of the Code of Civil Procedure.[2]

IV. Grounds for Attachment.

§ 21. In General.—The statutes do not specifically enumerate the grounds for the issuance of an attachment. From the context of section 537 of the Code of Civil Procedure, it is apparent that the principal ground for the issuance of a writ of attachment is the existence of an indebtedness. In the case of residents, however, the mere fact that a party is indebted to another is not sufficient of

19. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1.

20. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 Pac. 780.

1. Beeson v. Schloss, 60 Cal. Dec. 257, 192 Pac. 292 (accounting sought in action for recovery of money); Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 Pac. 780; Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718 (accounting sought in action for recovery of money); Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

2. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 Pac. 780. See CREDITORS' SUIT.

itself to warrant the issuing of the writ.[3] The debt, in the language of subdivision 1 of section 537 of the Code of Civil Procedure, must be one arising out of a contract "for the direct payment of money,"[4] which "is made or is payable in this state,"[5] and which is not "secured by any mortgage or lien upon real or personal property, or pledge of personal property";[6] or if such a debt was originally so secured, and "such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless," an attachment may issue on that ground.[7] This subdivision makes no mention of fraud as a ground for attachment, yet upon the authority of the court's ruling under a similar statute, it would seem that the remedy is available where there is an intention on the part of the debtor to defeat the rights of the creditor, as where a solvent debtor, able to pay his debt, threatens to dispose of his property.[8] An attachment has been granted on the ground that a plaintiff's remedy by appeal was inadequate.[9]

§ 22. **Nonresidence.**—Nonresidence is, under section 537 of the Code of Civil Procedure, a distinct ground for the issuance of attachment.[10] Under subdivision 2 of this section, any contract liability of a nonresident will form the basis of an attachment;[11] and under subdivision 3, attachment will issue on the ground that a nonresident has, "in consequence of negligence, fraud or other wrongful act," caused injury to property within the state.

3. Thornburgh v. Hand, 7 Cal. 554 (decided under the Practice Act). And see cases cited supra, § 11.

4. See supra, § 12.

5. See supra, § 13.

6. See supra, §§ 14, 15.

7. See supra, § 16.

8. White v. Leszynsky, 14 Cal. 165 (decided under the Practice Act).

9. Merced Mining Co. v. Fremont, 7 Cal. 130 (decided under the Practice Act).

10. Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 145 Pac. 734.

11. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

Meaning of nonresidence.—Subdivisions 2 and 3 of section 537 of the Code of Civil Procedure provide that the writ of attachment may issue in certain cases when the defendant is "not residing" in this state, while subdivisions 2 and 3 of section 538, relating to the affidavit of attachment, provide that it must appear that the defendant "is a nonresident." These two phrases are regarded as equivalent in meaning, and it is held that the residence referred to is an actual as contradistinguished from a constructive or legal residence or domicile.[12] The reason for allowing an attachment against a nonresident is that it is one mode of acquiring jurisdiction in a suit against him, and this purpose would not be satisfied if the debtor could preserve a constructive residence in the state by virtue of a general intention to return, when he was in fact residing in another state. So where a man has a settled abode for the time being, for purposes of business or pleasure, or for any other purpose, that is his residence within the meaning of the attachment law, notwithstanding an intention to return to the place of his constructive residence or domicile.[13] But the rule has not gone so far as to cover the case of a mere transient journey.[14] A corporation organized under the laws of a foreign state must be regarded as a nonresident within the meaning of the attachment law.[15] And for purposes of attachment, the situs of shares of stock is within the state where the corporation resides.[16]

12. Egener v. Juch, 101 Cal. 105, 35 Pac. 432, 873; Hanson v. Graham, 82 Cal. 631, 7 L. R. A. 127, 23 Pac. 56.

13. Hanson v. Graham, 82 Cal. 631, 7 L. R. A. 127, 23 Pac. 56 (in this case the court said: "We have not overlooked section 52 of the Political Code. But if a different rule is there provided, we think that the provision was not intended to apply to the attachment law"); Eck v. Hoffman, 55 Cal. 501.

14. Hanson v. Graham, 82 Cal. 631, 7 L. R. A. 127, 23 Pac. 56.

15. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

16. Wait v. Kern River Mining etc. Co., 157 Cal. 16, 106 Pac. 98.

V. PROCEEDINGS TO PROCURE ATTACHMENT.

In General.

§ 23. Jurisdiction of Court.—A court having jurisdiction of the action upon which attachment proceedings are based has jurisdiction of the question of the attachment. Such court may determine whether or not it is a proper case for the issuance of an attachment, and may pass upon the validity of the attachment proceedings generally.[17] Acts by a court in excess of its jurisdiction, of course, will render the proceedings entirely void.[18] The court acquires a sufficient jurisdiction of the property to protect its proceedings from collateral attack when it is brought within the power and control of the court by a seizure under a de facto writ of attachment issued in the action, although there may be irregularities, or even error, in the attachment proceedings.[19] But the mere seizure of property in a case in which a writ of attachment could not under any circumstances properly issue will not confer jurisdiction upon the court to satisfy the claims of the plaintiff out of such property, regardless of the validity of the proceedings upon which the attachment is based.[20]

§ 24. Defects and Irregularities in Proceedings.—The fact that attachment proceedings are defective or irregular for failure of the plaintiff to take the steps prescribed by the statute clearly constitutes good ground for a motion by the attachment defendant to dissolve the attachment.[1] And if he moves to dissolve the attachment in such a case, as he is entitled to do under section 556 of the Code of Civil Procedure, it is the duty of the court to

17. McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115 (decided under the Practice Act).

18. Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332 (decided under the Practice Act).

19. See infra, § 24.

20. Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147.

1. See infra, §§ 113, 116.

order the attachment to be dissolved,[2] unless the defects have been cured by amendment as provided by section 558 of the Code of Civil Procedure.[3] Any such irregularities, however, are waived by the defendant when he appears and answers without taking advantage of them by motion, or otherwise, in the course of proceedings, and as against him, the attachment is then valid.[4]

Since the lien of the attachment upon the recovery of a judgment in the action transit in rem judicatam, and is merged in the judgment, the attachment proceedings are not attackable collaterally for such infirmities by one not a party to the action.[5] Notwithstanding the defects, the proceedings are not void, but at most only voidable at the instance of the defendant in the attachment suit.[6] If the defendant does not insist upon the statutory steps being taken, it is difficult to perceive upon what principle others have a standing to object any more than in the case of a judgment rendered upon an insufficient complaint, or otherwise irregular or reversible.[7] A collateral attack upon an attachment proceeding can only be sustained for causes which render the writ absolutely void, and not merely voidable,[8] as, for example, when there is actual

2. Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849; Merced Bank v. Morton, 58 Cal. 360; Wilke v. Cohn, 54 Cal. 212. See infra, § 113.

3. See infra, § 38, as to amendment of affidavit; infra, § 39, as to amendment of undertaking.

4. Hammond v. Starr, 79 Cal. 556, 21 Pac. 971; Porter v. Pico, 55 Cal. 165.

5. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542; Shea v. Johnson, 101 Cal. 455, 35 Pac. 1023; Hammond v. Starr, 79 Cal. 556, 21 Pac. 971; Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849; Porter v. Pico, 55 Cal. 165. See infra, § 75, as to merger of attachment lien in judgment.

6. Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609; Dixey v. Pollock, 8 Cal. 570 (decided under the Practice Act).

7. Fridenberg v. Pierson, 18 Cal. 152, 79 Am. Dec. 162 (decided under the Practice Act).

8. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147 (citing Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, see, also, Rose's

fraud in its creation,[9] or when it is issued in an action; not of one of the classes in which attachment may properly issue under section 537 of the Code of Civil Procedure.[10]

Affidavit.

§ 25. Initiation of Proceedings.—Proceedings in attachment are initiated, in all cases, by the filing of an affidavit as required by section 538 of the Code of Civil Procedure.[11] This section provides as follows:

"The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, showing: 1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal setoffs or counterclaims) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or 2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal setoffs or counterclaims) and that the defendant is a nonresident of the state; or 3. That plaintiff's cause of action against defendant is one to recover a sum of money as damages (specifying the amount thereof) arising from an injury to property in this state in consequence of the negligence, fraud, or other wrongful act of defendant, and that the defendant

U. S. Notes); Fridenberg v. Pierson, 18 Cal. 152, 79 Am. Dec. 162 (decided under the Practice Act).

9. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

10. Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147.

11. Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019. See Code Civ. Proc., § 866 (providing for issue of attachment in actions in justices' courts).

is a nonresident of the state; and 4. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant."

No lawful attachment can issue in the absence of a sufficient affidavit,[12] for the affidavit is the basis of the writ.[13] The clerk must look to it alone for the purpose of determining the amount for which the sheriff is to levy under the writ, as well as the amount for which an undertaking is to be given. And although the plaintiff may file an unverified complaint in which judgment is sought against the defendant in a larger amount than he would be willing to support by his oath, he is entitled to a writ of attachment for only the amount for which he can "specify" in an affidavit that the defendant is "indebted" to him.[14]

It is to be noted that the requirements of section 538 of the Code of Civil Procedure as to the contents of the affidavit vary according to the nature of the action in which the attachment is sought. Subdivision 1, which applies particularly but not exclusively to residents, demands that the contract sued upon shall be shown to be one "for the direct payment of money, and that such contract was made or is payable in this state," and prescribes other limitations which are not applicable under subdivision 2. On the other hand, subdivisions 2 and 3 require that it be shown that the defendant is a nonresident, whereas subdivision 1 contains no reference to the residence of the

12. Merchants' Nat. Union v. Buiseret, 15 Cal. App. 444, 115 Pac. 58; Fairbanks etc. Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331; Nail v. Los Angeles Superior Court, 11 Cal. App. 27, 103 Pac. 902.

13. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

14. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732 (construing section 540 of the Code of Civil Procedure); Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

defendant.[15] Subdivision 4 of section 538 applies, of course, to the affidavit for attachment in any case.[16]

§ 26. By Whom Made.—Under section 538 of the Code of Civil Procedure the affidavit may be made by the plaintiff himself, or on his behalf by another, as, for example, by his attorney.[17] The section does not require that the person who makes affidavit in behalf of a creditor should show that he is the agent of the creditor for the collection of the debt, or by express averment that he makes it in his behalf, or that there is any particular reason or excuse for the omission of the creditor to make the affidavit himself; and there is nothing in the policy of the law that requires the interpolation of such provisions by construction.[18] It is sufficient that the affidavit was made by or on behalf of the creditor.[19] In deciding the question whether it sufficiently appears that the affidavit was so made, the court must refer to the entire affidavit.[20] Inas-

15. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 Pac. 780; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741 (the two cases last cited were decided prior to the amendment of section 538 of the Code of Civil Procedure in 1905, Statutes of 1905, page 434, making what was then subdivision 3 the present subdivision numbered 4, and adding the present subdivision numbered 3).

16. See infra, § 37.

17. Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41; affirmed, 168 Cal. 570, 143 Pac. 758; Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331; Hotaling & Co. v. Brogan, 12 Cal. App. 500, 107 Pac. 711. See, generally, as to making of affidavits by attorney or third party, AFFIDAVITS, vol. 1, p. 656.

18. Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406.

19. Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406; Hotaling & Co. v. Brogan, 12 Cal. App. 500, 107 Pac. 711.

20. O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465 (holding that an affidavit for attachment in a suit by receiver of a national bank, in the heading of which the title of the action showing the representative character of the plaintiff as receiver is prefixed, but the body of which gives his name without his representative title, and states "that he is the plaintiff in the above-entitled action," and that the defendant "is indebted to him" in a specified sum, must be construed to mean that the affiant is the plaintiff named as receiver in the title of the action, and that

much as a corporation cannot make an affidavit, when a corporation is plaintiff in attachment, the affidavit must be made on its behalf, and the fact that the name of the corporation is attached to it is of no importance, and involves no ambiguity upon the question as to who in fact made it.[1]

§ 27. **Formal Execution.**—Generally, the formal requisites of an affidavit are the title, venue, signature, jurat and authentication.[2] The signature of the affiant is not indispensable, and its absence will not invalidate the affidavit,[3] but to constitute a valid and effective affidavit, the oath must be taken and administered in a regular manner before a properly authorized officer. Where the oath of an affidavit for attachment to be used in one county was administered by a notary of that county to an affiant in another county, it was held that the act of administering the oath to him was a nullity, and that the purported affidavit upon which the attachment was issued was void and of no effect. It is no defense to a prosecution for perjury, upon an affidavit for attachment, that the oath was taken or administered in an irregular manner; nevertheless, the document which purports to be sworn to is not an affidavit, unless the notary had authority at the time to administer the oath.[4]

§ 28. **Knowledge or Information and Belief.**—Under statutes similar to section 538 of the Code of Civil Pro-

the defendant is indebted to him as characterized in the title of the action); affirmed, O'Conor v. Witherby, 112 Cal. 38, 44 Pac. 340; Hotaling & Co. v. Brogan, 12 Cal. App. 500, 107 Pac. 711.

1. Hotaling & Co. v. Brogan, 12 Cal. App. 500, 107 Pac. 711. See AFFIDAVITS, vol. 1, p. 657.

2. 2 Ruling Case Law, p. 826, § 37. See AFFIDAVITS, vol. 1, p. 662.

3. Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331; Hotaling & Co. v. Brogan, 12 Cal. App. 500, 107 Pac. 711. See AFFIDAVITS, vol. 1, p. 663.

4. Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331 (in this case the oath was administered by telephone, the notary being in one county and the affiant in another). See AFFIDAVITS, vol. 1, p. 665.

cedure, it has been held that an affidavit which is expressed to be made on information and belief is not sufficient; that the statements of the affidavit must be positive and clear, and this requirement is not satisfied by allegations on information and belief merely.[5] But the affidavit need not state whether its averments are based upon direct knowledge, or upon information and belief, and if the facts are stated positively, it will be implied that they were within affiant's knowledge; and this is equally true whether the affidavit is made by the creditor or by another on his behalf.[6]

§ 29. Recitals Generally.—It has been declared that in order for an attachment affidavit to meet the proper test of sufficiency, it is necessary that it be so clear and certain that an indictment for perjury may be sustained upon it if false.[7] But an affidavit for the issuance of a writ of attachment is not strictly a pleading. It is more a matter of evidence,[8] and with the exception of the specification of the amount of the indebtedness of the defendant to the plaintiff,[9] the same particularity of statement is not required in it that is required in a pleading.[10] The rule with regard to a negative pregnant, as also an affirmative pregnant, has reference more particularly to a pleading.[11]

It is not necessary for the affidavit to state the probative facts requisite to establish the ultimate facts required by the statute to be shown as the basis of the writ;[12] but

5. Ahlhauser v. Butler, 57 Fed. 125 (citing Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406). See AFFIDAVITS, vol. 1, p. 671.

6. Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406.

7. Hotaling & Co. v. Brogan, 12 Cal. App. 502, 107 Pac. 711.

8. Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41.

9. See infra, § 31.

10. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465; Flagg v. Dare, 107 Cal. 482, 40 Pac. 804; Bank of California v. Boyd, 86 Cal. 386, 25 Pac. 20.

11. Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41.

12. Wheeler v. Farmer, 38 Cal. 203 (decided under the Practice Act). See, generally, AFFIDAVITS, vol. 1, p. 669.

there should be a sufficient statement of the nature of the claim or cause of action which serves as the basis of the writ to enable the court to determine if it is a proper case for the issuance of the writ.[13] Any language which shows that the case falls within the statute is sufficient.[14] Needless to say, however, language which will defeat the very purpose for which the affidavit is required will render it fatally defective. Thus, an attachment of the defendant's property is invalid where the affidavit does not state, as required by the Code of Civil Procedure, section 538, subdivision 4, "that the attachment was not sought to hinder, delay or defraud any creditor or creditors of defendant," but uses the word "judgment" in lieu of the word "attachment," employed in the statute.[15]

In determining the sufficiency of an affidavit the entire affidavit is to be considered,[16] and it is to be given a fair and reasonable construction in arriving at its meaning.[17]

Affidavits for attachments in a justice's court are not required to be noted in the docket of the justice; and where they are lost, secondary evidence of their existence and contents is sufficient to support a finding based thereon.[18]

§ 30. Alternative and Disjunctive Statements.—It is well established that an attachment affidavit is rendered fatally defective by allegations of different grounds of attachment in the alternative.[19] In such a case the affiant

13. Hisler v. Carr, 34 Cal. 641; Hathaway v. Davis, 33 Cal. 161; Hawley v. Delmas, 4 Cal. 195 (these cases were decided under the Practice Act).

14. O'Conor v. Witherby, 112 Cal. 38, 44 Pac. 340 (affirming O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465); Flagg v. Dare, 107 Cal. 482, 40 Pac. 804; Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406; Norcross v. Nunan, 61 Cal. 640.

15. Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444, 115 Pac. 58.

16. Hotaling & Co. v. Brogan, 12 Cal. App. 500, 107 Pac. 711.

17. Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41.

18. Banning v. Marleau, 133 Cal. 485, 65 Pac. 964.

19. Winters v. Pearson, 72 Cal. 553, 14 Pac. 304; Merced Bank v. Morton, 58 Cal. 360; O'Connell v. Walker, 12 Cal. App. 694, 108 Pac.

swears neither to one ground nor to the other, and it is impossible to determine which ground is relied upon to sustain the attachment. And the fact that such a form of statement is the result of the language of the statute being followed does not affect the application of the rule. Thus an affidavit alleging in the bald language of the statute that the indebtedness arose "upon a contract express or implied for the direct payment of money,"[20] is insufficient to support an attachment.[1] Such an affidavit does not establish the essential fact that any sum of money is due from the defendant to the plaintiff upon a contract for the direct payment of money.[2] So, also, an affidavit which literally follows the alternative form prescribed by statute, where the claim declared upon arises out of a contract for the direct payment of money, that "the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or if originally so secured, that such security has, without any act of the plaintiff, or the person to whom such security was given, become valueless,"[3] does not state either main alternative with certainty, and is insufficient to authorize the issuance of the writ.[4]

However, where the disjunctive "or" is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, the construction that it is uncertain which state of facts existed is inapplicable. It is proper to follow the language of the statute in saying that payment had "not been secured by any mortgage or lien upon real or per-

668. As to alternative allegations in affidavits generally, see AFFIDAVITS, vol. 1, p. 673.

20. Code Civ. Proc., § 538, subd. 1.

1. Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406; Hawley v. Delmas, 4 Cal. 195 (decided under a similar provision of the Practice Act).

2. Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406.

3. Code Civ. Proc., § 538, subd. 1.

4. Winters v. Pearson, 72 Cal. 553, 14 Pac. 304; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849; Wilke v. Cohn, 54 Cal. 212; O'Connell v. Walker, 12 Cal. App. 694, 108 Pac. 668.

sonal property, or any pledge of personal property."[5] And an affidavit stating disjunctively in the words of the statute that the amount of the indebtedness "over and above all legal setoffs or counterclaims,"[6] is not thereby rendered void.[7]

§ 31. Recital of Indebtedness in General.—Section 538 of the Code of Civil Procedure requires that the affidavit shall state the amount of the indebtedness when the action is upon a contract, express or implied.[8] And while in general the same particularity of statement is not required in an affidavit for attachment that is required in a pleading, this rule does not extend to the matter of the indebtedness.[9] The amount of the indebtedness to the plaintiff is the principal and all-important element in the affidavit in such an action.[10] The amount stated therein determines how much of defendant's property the sheriff is to seize, and this in turn limits the amount for which an undertaking may be demanded by the sheriff to prevent or release the attachment.[11] When such indebtedness appears by direct statement, and there is nothing in the

5. Code Civ. Proc., § 538, subd. 1; Wilke v. Cohn, 54 Cal. 212 (quoting from Drake on Attachments, § 102).

6. Code Civ. Proc., § 538, subds. 1, 2.

7. O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465.

8. Subds. 1, 2; Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

9. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019. See supra, § 29.

10. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732; Bank of California v. Boyd, 86 Cal. 386, 25 Pac. 20 (holding that an affidavit which alleges that the defendants are indebted to the plaintiff on a promissory note executed in favor of a third party sufficiently shows that the note is owned by the plaintiff, though the affidavit does not state, in terms, that the note was indorsed to the plaintiff); Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

11. Code Civ. Proc., § 540; Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019. See supra, § 25.

affidavit inconsistent with the statement, the affidavit is sufficient in this respect.[12]

The affidavit need not state the facts out of which the indebtedness of the defendant to the plaintiff arose.[13] Nor is it necessary that it should state whether the contract for the payment of money is express or implied. A showing that the defendants are indebted to the plaintiff in a specified sum upon a contract for the direct payment of money is sufficient.[14] Any further recital is surplusage and may be disregarded.[15] Accordingly, a statement in an affidavit that money is due upon an implied contract, when in fact it is due upon an express one, does not make the affidavit defective.[16]

§ 32. Interest.—The cases are not decisive upon the question whether the rule requiring certainty of statement in the matter of the indebtedness of the defendant extends to the interest due upon the principal debt. Considering

12. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238 (holding that an affidavit stating that defendant was indebted to plaintiff in an amount certain upon an implied contract for the direct payment of money was not vitiated by the inclusion of the words "in addition to certain claims for damages for breach of contract hereinafter referred to," the words quoted being mere surplusage, throwing no doubt upon the amount for which attachment was requested); O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465; affirmed, O'Conor v. Witherby, 112 Cal. 38, 44 Pac. 340; Bank of California v. Boyd, 86 Cal. 386, 25 Pac. 20; Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64; Weaver v. Hayward, 41 Cal. 117 (decided under the Practice Act); Wheeler v. Farmer, 38 Cal. 215 (decided under the Practice Act); Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

13. Weaver v. Hayward, 41 Cal. 117 (decided under the Practice Act).

14. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465; affirmed, O'Conor v. Witherby, 112 Cal. 38, 44 Pac. 340; Flagg v. Dare, 107 Cal. 482, 40 Pac. 804; Bank of California v. Boyd, 86 Cal. 386, 25 Pac. 20; Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406.

15. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238.

16. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238.

that the indebtedness referred to by subdivisions 1 and 2 of section 538 of the Code of Civil Procedure is the principal debt, and that the interest pertains to it as a mere incident, it would seem that the rule does not apply.[17] And it has been held that an affidavit which alleges a specific indebtedness of the defendants to the plaintiff in a principal sum is not vitiated by referring to "interest and attorney's fees," without further specification. Such an affidavit is sufficient to sustain the attachment, at least to the extent of the principal sum.[18] However, under the rule that the affidavit is the basis of the writ and that the amount of the indebtedness stated therein is determinative of how much of the debtor's property the sheriff shall seize, it has been declared that the interest cannot be treated as a mere incident to the principal. It follows that when such a view of the matter is taken, the same particularity is required of statements in regard to interest as of those setting out the amount of the principal debt.[19]

§ 33. Setoffs and Counterclaims.—Subdivisions 1 and 2 of section 538 of the Code of Civil Procedure require the plaintiff to state in the affidavit the amount of the defendant's indebtedness to him "over and above all legal setoffs or counterclaims." This requirement would seem to indicate a purpose to deny an attachment for so much of the plaintiff's claim as is covered by admitted setoffs,

17. O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465.

18. Tibbet v. Tom Sue, 122 Cal. 206, 41 Pac. 741.

19. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019 (in this case the court, in attempting to reconcile O'Conor v. Roark, cited supra, said: "There is nothing in O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465, in conflict with the view here taken. In the statement of the contract in the affidavit for an attachment in that case there appeared the date of maturity of the obligation upon which the attachment rested, and the amount stated would be presumed to draw the legal rate of seven per cent from that date. The demand set forth in the writ was well within that averment of the affidavit and stated the amount demanded in the complaint").

See supra, §§ 25, 31, as to rule that affidavit is basis of writ.

even though it is optional with the defendant and not with the plaintiff, whether the setoffs are to be used in the particular case or not; though as to the first class of setoffs defined by section 438 of the Code of Civil Procedure, viz., those arising out of the same transaction alleged as the basis of the plaintiff's claim, the rule is that, if they are not set up in the action, they are thereby waived, there is no wrong or injustice in compelling the plaintiff to admit the setoff in order to secure an attachment. By force of the requirement, it may often happen that the amount of the plaintiff's claim properly stated in the complaint will exceed the statement of the same claim in the affidavit, after deducting the setoffs or counterclaims. In consequence, the fact that the writ of attachment is issued for a less amount than that stated in the complaint will not invalidate it. It will be assumed that any difference is the result of an allowance made by the plaintiff for any possible setoff or counterclaim in favor of the defendant.[20] An affidavit stating conjunctively that the amount of indebtedness is "over and above all legal setoffs and counterclaims" is a sufficient compliance with the requirement of the statute that the indebtedness must be shown to be "over and above all legal setoffs or counterclaims."[1]

§ 34. Conformity With Demand of Complaint.—Upon a proper construction of sections 538 and 540 of the Code of Civil Procedure, the fact that the affidavit for an attachment states an amount as due which is less than the demand of the plaintiff as stated and prayed for in the complaint, and that the writ is issued for the lesser amount, does not render the writ irregularly issued.[2] Section 538 requires the affidavit to specify only the amount of the indebtedness, and not the amount of plaintiff's demand in

20. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718. See supra, §§ 49, 50.

1. O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465.

2. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

the complaint, which may be for the principal debt, interest and costs.[3] And, while section 540 requires the writ of attachment to command the sheriff to attach so much property "as may be sufficient to satisfy the plaintiff's demand," and to state the amount of such demand "in conformity with the complaint," there is no requirement that the affidavit shall specify the amount of the indebtedness in conformity with plaintiff's demand as stated in the complaint.[4] Hence it is immaterial that the plaintiff has included in his complaint demands which do not appear in the affidavit.[5] But when the affidavit states an amount far in excess of the amount demanded in the complaint, this variance is such a material departure from the requirements of these sections of the code as to vitiate the proceedings and render the writ utterly void.[6]

§ 35. **Recital of Security.**—It is demanded among other prerequisites which are required by the statute to be observed before a writ of attachment is authorized to be issued, that the affidavit, where the claim declared upon arises out of a contract, express or implied, for the direct payment of money, must contain the statement "that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property," or if originally so secured, and the security has become valueless, "that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless."[7] This requirement is fully met by an allegation, in the words of the statute, that the payment of the contract or contracts sued upon has not been secured, without the addition of the

3. O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465.

4. O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465. See supra, § 50, as to conformity of writ with affidavit.

5. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238.

6. Ralphs v. Burns, 22 Cal. App. 153, 133 Pac. 997.

7. Code Civ. Proc., § 538, subd. 1; O'Connell v. Walker, 12 Cal. App. 694, 108 Pac. 668.

words, "nor has any part thereof been secured," or words of similar import.[8] And an affidavit showing that the indebtedness was secured by a mortgage, and stating the general conclusion that "said mortgage, without any act of plaintiff, or the person to whom the security was given, became valueless," is sufficient to justify the clerk in issuing the writ.[9] It is not essential, however, that the recitals of the affidavit be couched in the strict language of the statute.[10] But the affidavit must truly recite, in substance at least, the facts required by the statute to be shown, and where it falsely states that the debt has not been secured by any mortgage, lien or pledge of personal property, and does not state that security had been given, and that it had become valueless, an amended complaint setting forth the true situation cannot supply the place of an affidavit stating the facts, and the attachment is properly discharged.[11] Since the limitation of the right of attachment to actions upon unsecured contracts applies only where the action is within the class specified by subdivision 1 of section 537 of the Code of Civil Procedure, in an action against a nonresident upon a contract, it is immaterial to the validity of the attachment that the affidavit falsely states that the claim sued on is unsecured.[12]

§ 36. **Recital of Residence of Defendant.**—The several subdivisions of section 538 of the Code of Civil Procedure

8. Nichols v. Davis, 168 Cal. 570, 143 Pac. 758.

9. Barbieri v. Ramelli, 84 Cal. 174, 24 Pac. 113.

10. O'Conor v. Witherby, 112 Cal. 38, 44 Pac. 340 (holding that a statement in the affidavit for attachment against a resident debtor, in reference to security for the debt, "that the same has not been secured by any mortgage or lien upon real or personal property, or any pledge upon personal property," is not rendered insufficient because the words of the statute, "pledge of personal property," are not used therein, the intention of the affiant being plain, and the declaration that he has no lien upon personal property being a sufficient negative of all possibility of his having any pledge of personal property).

11. Fisk v. French, 114 Cal. 400, 46 Pac. 161. See supra, § 30, to effect of recital as to security being in alternative.

12. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

are different in their requirements as to the contents of the attachment affidavit. One marked difference lies in the fact that, whereas subdivisions 2 and 3 require the affidavit to show that the defendant is a "nonresident of the state," subdivision 1 makes no mention of the residence of the defendant. Thus questions arise as to whether an affidavit made under subdivision 1 must make reference to the residence of the defendant, and whether in every case of a nonresident defendant the fact of nonresidence must be averred. Construing sections 537 and 538 of the Code of Civil Procedure together, the court has expressed its opinion with reference to these questions as follows:—

"Subdivisions 1 do not mention the subject of the residence of the defendant. It is only in subdivisions 2 and 3 that the requirement appears. These latter subdivisions are drawn expressly for the benefit of those seeking to attach the property of nonresidents. It follows that in attaching property of a resident the affidavit must be drawn under subdivisions 1; but it does not follow, . . . that in seeking to attach the property of a nonresident the attachment cannot be sued out under subdivisions 1 without averring the fact of nonresidence. It is only when a plaintiff has a cause of action different from the kind contemplated by subdivisions 1 that advantage may be taken of the more liberal requirements of subdivisions 2 and 3. These apply only to nonresidents, and in every instance the fact of nonresidence must be averred. Where the cause of action comes under subdivisions 1 of these two sections, the residence of the defendant is immaterial."[13]

The affidavit is not rendered fatally defective, however, by a failure to state expressly that the defendant is a nonresident. In view of the proviso of section 558 of the Code of Civil Procedure added in 1909, such a defect is remediable by amendment.[14] An averment in the affidavit

13. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 Pac. 780, per Lawlor, J.

14. Hamburger v. Halperm, 28 Cal. App. 317, 152 Pac. 61. See infra, § 38, to amendment of affidavit.

respecting the residence of a defendant is not conclusive, but the fact may be inquired into. Resident defendants may contradict the affidavit by evidence of their residence in the state, for the purpose of showing that the affidavit is insufficient as to them, and that the writ was improperly issued, and should be discharged as to them.[15]

§ 37. **Recital of Good Faith.**—The statute requires that the affidavit shall show in all cases "that the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant."[16] Construing this section, the court has declared that its manifest object and purpose is to require the affidavit to show that the attachment is not sought, and the action is not prosecuted to hinder, delay or defraud any creditor of any defendant against whom the writ may run.[17] In accordance with this view it has been held that an affidavit which states "that the said attachment is not sought . . . to hinder, delay or defraud any creditor or creditors of the defendant," is insufficient, where there are several defendants, as it only refers to one defendant.[18] Similarly, where the writ was against the maker and indorsers of a promissory note, an affidavit for the writ, merely stating "that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the defendants," without adding the words, "or any creditor of either of said defendants," was held to be fatally defective.[19]

§ 38. **Amendments.**—Prior to the amendment of 1909 to section 558 of the Code of Civil Procedure, no affidavit for attachment could be amended, the section then reading that if on application for the discharge of the writ of

15. Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

16. Code Civ. Proc., § 538, subd. 4.

17. Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

18. Peterson v. Beggs, 26 Cal. App. 760, 148 Pac. 541.

19. Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

attachment under section 556 of the same code "it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged."[20] The section as amended in 1909[1] provides that, notwithstanding the fact that the writ of attachment is improperly or irregularly issued, nevertheless it shall not be discharged "if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter."[2] Under this proviso the attaching party may, by amendment, supply that which, by reason of inadvertence or oversight, was omitted from the affidavit,[3] "but the provision cannot be construed as authorizing the filing of an affidavit in support of a writ theretofore issued in the absence of that which constitutes the substance of the act required as a prerequisite to the issuance thereof." The changed law contemplates the existence of an irregular affidavit susceptible of amendment; and when the act of the notary in administering the oath was a nullity, and the purported affidavit is void, there is nothing to amend.

20. Tibbet v. Tom Sue, 122 Cal. 206, 54 Pac. 741 (this case was decided under section 558 of the Code of Civil Procedure, prior to its amendment in 1909, and held that it controlled and limited the general provisions of section 473 of the same code, relative to the amendment of pleadings or proceedings in furtherance of justice); Winters v. Pearson, 72 Cal. 553, 14 Pac. 304; Hamburger v. Halperm, 28 Cal. App. 317, 152 Pac. 61; Fairbanks-Morse & Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331; Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

1. Stats. 1909, p. 253.

2. Chap. IV, tit. VII, part II, entitled "Attachment"; Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41; affirmed 168 Cal. 570, 143 Pac. 758; Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 145 Pac. 734.

3. Hamburger v. Halperm, 28 Cal. App. 317, 152 Pac. 61 (an affidavit defective by reason of failure to aver that the defendant is a nonresident is amendable); Peterson v. Beggs, 26 Cal. App. 760, 148 Pac. 541; Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41; affirmed 168 Cal. 57, 143 Pac. 758; Fairbanks-Morse & Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331.

There can be no irregularity in that which had no existence. In such case, the code amendment is inapplicable.[4]

There is a substantial compliance with the requirement of this provision where the amended affidavit is filed before the actual determination of the motion to dissolve the attachment.[5] So, while it is proper that an attachment be discharged if no application to amend has been made before such time,[6] it is error to dissolve an attachment upon the ground that the affidavit therefor is defective where the court before granting the motion had permitted the affidavit, pursuant to section 558 of the Code of Civil Procedure as amended in 1909, to be amended to cure the defect.[7] There is no ground for any criticism of the sufficiency of an amended affidavit which is formally executed in accordance with the requirements of section 538 of the Code of Civil Procedure.[8]

Under sections 538 and 558 of the Code of Civil Procedure, an amended affidavit in attachment proceedings can be made for the plaintiff by his attorney; and this is so though the original was made by the plaintiff.[9]

4. Fairbanks-Morse & Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331, per Shaw, J. (quoted and followed in Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41, affirmed 168 Cal. 570, 143 Pac. 758, where the court said: "We can conceive of an affidavit not absolutely void yet lacking in some substantive particular, but showing an honest attempt to follow the statute. It is not always easy to distinguish between matter of form merely and substance in dealing with statutory remedies and with statements required in affidavits. We should hesitate to differ from our learned brother and it may be that his construction of the statute is a safe and sound one. In the case in hand, however, such construction may be accepted and the order appealed from, in our opinion upheld").

5. Peterson v. Beggs, 26 Cal. App. 760, 148 Pac. 541; Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 145 Pac. 734.

6. Peterson v. Beggs, 26 Cal. App. 760, 148 Pac. 541.

7. Hamberger v. Halperm, 28 Cal. App. 317, 152 Pac. 61.

8. Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 145 Pac. 734.

9. Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41; affirmed, 168 Cal. 570, 143 Pac. 758. See supra, § 26, as to who may make affidavit.

Undertaking.

§ 39. Undertaking in General.—Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff,

"in the sum not less than two hundred dollars and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, and that if the attachment is discharged on the ground that the plaintiff was not entitled thereto under section five hundred and thirty-seven, the plaintiff will pay all damages which the defendant may have sustained by reason of the attachment, not exceeding the sum specified in the undertaking."[10]

The same is true, in general, of actions in justices' courts, the requirement in such cases, due to the limited jurisdiction of the court, being that the undertaking shall be "in a sum not less than fifty nor more than three hundred dollars."[11]

The undertaking is the antecedent of the writ of attachment, but its legal effect is dependent upon the issuance and levy of the writ. If no writ were issued, the undertaking would be void.[12] Conversely, a writ of attachment is improperly issued unless it is supported by an undertaking conforming substantially to the requirements of the statute,[13] and levies of writs which are void by reason of defective undertakings do not create valid liens on the property attached, and do not constitute lawful security for the debt sued on; nor do they operate to bar or pre-

10. Code Civ. Proc., § 539.

11. Code Civ. Proc., § 867.

12. Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332 (decided under the Practice Act).

13. Kern Valley Bank v. Koehn, 157 Cal. 237, 107 Pac. 111; Tibbet v. Tom Sue, 122 Cal. 206, 54 Pac. 741; Gow v. Marshall, 90 Cal. 565, 27 Pac. 422; Hisler v. Carr, 34 Cal. 646 (action in justice's court).

vent a new proceeding upon a valid undertaking in the same action.[14]

Only a substantial compliance with the statute as to undertakings is required.[15] It is no objection to an undertaking that it is made payable to the people of the state of California, instead of the defendant in the suit, as the latter can sue thereon in his own name.[16] An undertaking for a greater sum than that required by law is not objectionable,[17] but when the penalty is less than the required amount, the undertaking is insufficient to authorize the issuance of a writ.[18] Mandamus will not lie to compel the court to increase the amount of an undertaking given in conformity with the provisions of section 539 of the Code of Civil Procedure.[19] The undertaking is an original, independent contract on the part of the sureties, and must be construed in connection with the statute which authorizes it.[20]

Amendment.—Prior to the amendment of section 558 of the Code of Civil Procedure in 1909,[1] an insufficient undertaking on attachment was not amendable.[2] Under this section as changed, however, a defective undertaking may be amended, and when amended it has the effect of validating the proceeding in attachment from its inception.[3]

§ 40. In Action by Government.—The policy of the law requires that the state shall be allowed to sue out an at-

14. Kern Valley Bank v. Koehn, 157 Cal. 237, 107 Pac. 111.

15. Frankel v. Stern, 44 Cal. 168 (decided under the Practice Act).

16. Taaffe v. Rosenthal, 7 Cal. 514 (decided under the Practice Act).

17. Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600.

18. Hisler v. Carr, 34 Cal. 641 (decided under the Practice Act).

19. American etc. Co. v. Superior Court, 19 Cal. App. 497, 126 Pac. 497.

20. Frankel v. Stern, 44 Cal. 168 (decided under the Practice Act). See infra, §§ 124, 125, 128, 129, as to actions on undertaking).

1. Stats. 1909, p. 253.

2. Tibbet v. Tom Sue, 122 Cal. 206, 54 Pac. 741.

3. Bone v. Trafton, 31 Cal. App. 30, 159 Pac. 819.

tachment without giving a bond or undertaking, and the code has placed cities and counties upon the same footing. It is provided by section 1058 of the Code of Civil Procedure that,

"In any civil action or proceeding wherein the state or the people of the state is a party plaintiff, or any state officer, in his official capacity, or on behalf of the state, or any county, city and county, city or town, is a party plaintiff or defendant, no bond, written undertaking or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city or town."

To entitle a city, or a county, or a city and county, therefore, to an attachment against the property of a debtor, it is only necessary to file the complaint and affidavit prescribed by the Code of Civil Procedure, and thereupon it becomes the duty of the clerk to issue the writ. An undertaking on attachment given by a city, or a county, or a city and county, clearly is not a statutory undertaking, and being in contravention of the policy of the law, it is void as a common-law bond.[4] It has been held that a section of a county ordinance providing that, in an action by the county to recover a license tax, a writ of attachment may issue without bond, is in harmony with section 1058 of the Code of Civil Procedure.[5]

§ 41. Affidavit of Sureties.—Section 1057 of the Code of Civil Procedure declares:

"In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are

4. Morgan v. Menzies, 60 Cal. 341 (this case was decided under section 1058 of the Code of Civil Procedure as it existed prior to its amendment in 1880 by the insertion of the words "city and county" after "county," the court holding that the section had the same effect as though it read as it does at present).

5. San Luis Obispo Co. v. Greenberg, 120 Cal. 300, 52 Pac. 797.

each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking or bond over and above all their just debts and liabilities, exclusive of property exempt from execution."

Construing this section in connection with section 539 of the same code,[6] it is plain that the clerk has no authority to issue a writ of attachment unless the request is accompanied by an undertaking, with an affidavit attached setting forth the facts demanded by section 1057. A writ issued upon an undertaking unaccompanied by such an affidavit of the sureties is irregularly and improperly issued, and the defendant may apply for its discharge.[7] If a required statement is omitted merely by inadvertence, the affidavit may, under section 558 of the Code of Civil Procedure, be amended so as to supply the defect. The filing of a new affidavit and undertaking and the procuring thereon of a new writ of attachment to correct an omission in the original affidavit accompanying the undertaking, does not constitute an abandonment of the original or first attachment, so as to permit a chattel mortgage executed between the issuance of the two writs to become a first lien, where the attached property was held by the sheriff at all times under the first attachment.[8]

§ 42. Exception to and Justification of Sureties.

"At any time after the issuing of the attachment, but not later than five days after actual notice of the levy thereof, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as upon bail on arrest; and upon

6. Section 539 of the Code of Civil Procedure is quoted supra, § 39.

7. Tibbet v. Tom Sue, 122 Cal. 206, 54 Pac. 741. See infra, §§ 109–120, as to dissolution of attachment.

8. Bone v. Trafton, 31 Cal. App. 30, 159 Pac. 819. See infra, §§ 76–87, as to priority of attachment lien; and § 74 as to abandonment of lien.

failure to justify, or if others in their place fail to justify, at the time and place appointed, the judge or clerk must issue an order vacating the writ of attachment."[9]

These provisions apply when the action is prosecuted in a justice's court.[10]

Where the sureties on an undertaking were excepted to, and one of them failing to justify, the creditor properly presented a new surety, and there was nothing to show that the debtor questioned his sufficiency, or was denied the right to examine the same, it was held that the facts showed a waiver on the part of debtor of other than the prima facie justification made by presenting and filing an undertaking duly executed by such new surety. A failure of sureties to justify when they have been excepted to furnishes grounds for a motion to dissolve an attachment subsequently levied.[11]

VI. WRIT OF ATTACHMENT.

§ 43. Nature of Writ.—The writ of attachment is a process purely statutory in origin. Its scope, purpose and effect, its capacity to create a lien, the efficacy, duration and the mode of enforcement of the lien, are not other or greater than the statute has prescribed.[12] Although it is commonly characterized as a mesne process,[13] and, under section 559 of the Code of Civil Procedure, may be received by the sheriff with the summons,[14] it is closely allied to final process. It is substantially a writ of execution except that it emanates at the beginning instead of at

9. Code Civ. Proc., § 539.

10. Code Civ. Proc., § 867.

11. La Dow v. National Bldg. etc. Assn., 11 Cal. App. 308, 104 Pac. 838.

12. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1; Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49 (construing the Practice Act). See supra, § 2.

13. Porter v. Pico, 55 Cal. 165; Howe v. Union Ins. Co., 42 Cal. 528 (decided under the Practice Act).

14. Maskey v. Lackman, 146 Cal. 777, 81 Pac. 115.

the termination of the suit.[15] Its object is to seize and hold property subject to the claims sued on, and to satisfy them in event of judgment being rendered for the plaintiff.[16]

§ 44. Issuance Generally.—The issuance of a writ of attachment is not a judicial proceeding, but a ministerial act on the part of the clerk of the court in which the action is commenced, which he is bound to perform on the filing of the statutory affidavit and undertaking.[17] It may be said to have been properly issued when issued in a case provided for by section 537 of the Code of Civil Procedure, and it is regularly issued when the requirements of sections 538 and 539 of the same code are complied with.[18] While the clerk performs but a ministerial duty in issuing the writ, he has no authority to issue it where there is no statement in the affidavit of the facts plainly required to be set forth therein,[19] or where the affidavit is not supported by the statement of an attachable cause of action by the complaint.[20] The clerk is under the further duty of not making public the filing of the complaint in the principal action, or of the issuing of the attachment, until after the filing of the return of service of attachment.[1]

15. See cases cited, supra, § 1. See EXECUTIONS.

16. Porter v. Pico, 55 Cal. 165. See supra, § 4.

17. Code Civ. Proc., §§ 538, 539; Martinovich v. Marsicano, 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333; Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 137, 77 Pac. 669; Le Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; McCusker v. Walker, 77 Cal. 212, 19 Pac. 382; Wheeler v. Farmer, 38 Cal. 203; Lick v. Madden, 25 Cal. 202 (holding that the clerk must issue the writ without prepayment of his fees or a tender of the same if he fails to call for prepayment); Thornburgh v. Hand, 7 Cal. 554; Hotaling & Co. v. Brogan, 12 Cal. App. 500, 107 Pac. 711; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

18. Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

19. Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444, 115 Pac. 58; McCusker v. Walker, 77 Cal. 208, 91 Pac. 382; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

20. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

1. Pol. Code, § 1032.

§ 45. Plural Writs.—The law with reference to the issuance of plural writs of attachment has been well summarized as follows:

"Section 540 of the Code of Civil Procedure, after declaring that the writ must be directed to the sheriff of any county in which property of the defendant may be, and in terms require him to attach and safely keep all property of the defendant within his county not exempt from execution, provides: Several writs may be issued at the same time to the sheriffs of different counties. This provision of section 540 was intended solely in aid of the plaintiff in attachment, and the whole purpose was to authorize such a plaintiff to have at one time two or more writs addressed to sheriffs of different counties, so that property of the defendant in various counties necessary to secure the plaintiff's claim may be levied on under the one proceeding for attachment instituted by him. The plaintiff in attachment is, by virtue of the showing made and security given, entitled to have as many writs issued to different sheriffs as he may see fit to demand. All writs so demanded and issued constitute parts of the one proceeding to have the property of the defendant in the state levied on as security for any judgment that may be obtained, and have for their basis the affidavit and undertaking given to secure the remedy of attachment. If by his first demand he has failed to ask for and secure a writ for a county in which he almost immediately thereafter discovers attachable property necessary to his security, no good reason is apparent why he may not reach such property by procuring what he would have been entitled to as a matter of right in the first instance by including it in his demand to the clerk, thus accomplishing the same result that he would be enabled to obtain as to property subsequently discovered in a county for which a writ had issued, before the return of the attachment, by a simple direction to the sheriff."[2]

With reference to the issuance of plural writs in actions in justices' courts, the Code of Civil Procedure, section 868, provides as follows:

2. Martinovich v. Marsicano, 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333, per Angellotti, J.

"Several writs may be issued at the same time to the sheriffs or constables of different counties; provided, that where a writ of attachment issued by a justice of the peace is to be served out of the county in which it was issued, the writ of attachment shall have attached to it a certificate under seal, by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace of said county, at the date of the writ."

§ 46. Time of Issuance Generally.—The code clearly contemplates that the main proceedings shall have been instituted prior to the issuance of the writ, but it does not limit its issuance to any particular time during the pendency of the action. It may, under section 537 of the Code of Civil Procedure, be issued "at the time of issuing the summons, or at any time afterward,"[3] provided, when the action is prosecuted in a court of record, a proper affidavit and undertaking have been furnished by the plaintiff as required by sections 538 and 539, respectively, of the Code of Civil Procedure;[4] or, when the action is prosecuted in a justice's court, provided such an affidavit[5] and the undertaking required by section 867 of the Code of Civil Procedure have been given. Section 537 of the Code of Civil Procedure is general, and applies to cases where substituted service is had as well as to others.[6]

Some time must, from the nature of things, elapse between the making of the affidavit or its filing and the issuance of the writ, but as the ground of attachment must exist at the time the warrant is issued, an unreasonable time should not be allowed to elapse between the making of the affidavit and the issuance of a writ. By the term "unreasonable time" as herein used is meant such delay as would, under the circumstances, cast suspicion on the

3. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240.

4. Martinovich v. Marsicano, 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333.

5. Code Civ. Proc., § 866.

6. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240.

verity of the affidavit or lead to the supposition that the ground stated for the attachment had ceased to exist. While there may be such delay between the making of the affidavit and the suing out of the writ, yet in the absence of statute to the contrary, such divergence of dates is not a jurisdictional matter, which will enable the court, on appeal, to consider the question in a case where the point was not raised and considered below on appropriate motion or plea. This is as applicable to a second writ issued to another county after the issuance of the first writ as it is to a case of delay between the making of the affidavit and the procuring of the first writ. The protection afforded by the law to the defendant against an improper attachment is as broad in the one case as in the other. In each, no jurisdictional defect being apparent on the face of the proceeding, the only remedy, under the present system, is a motion to set aside the attachment, and on this motion the showing made by the affidavit in support of the judgment can be assailed, and the attachment which has been improperly issued discharged.[7]

Although, under the code, a writ of attachment cannot properly issue until after the commencement of the suit. to which it is only auxiliary, still there seems to be no valid objection to a complete preparation of all the papers requisite to the writ of attachment before or at the same time the complaint is prepared, providing the affidavit and undertaking in attachment be not filed in advance of the original complaint, and the writ not issued in advance of the summons and certified copy of the complaint, to which it is incident.[8]

§ 47. Order of Issuance.—While it is the duty of the clerk of the court to issue and deliver to the parties re-

7. Martinovich v. Marsicano, 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333, per Angellotti, J. (quoting from Hadden v. Linville, 86 Md. 210, 38 Atl. 900, as stating "the time rule").

8. Wheeler v. Farmer, 38 Cal. 203 (decided under the Practice Act).

spectively, or to their attorneys, writs of attachment in the order in which the preliminary papers are presented to them, and the writs demanded, yet if the party who makes a prior demand is not in attendance to receive his writ as soon as it is ready for delivery, the clerk is not bound to delay the issuing of other writs against the same party which may have been demanded in the meantime. On the contrary, such delay does not admit of legal justification. Having prepared for delivery the writ first demanded, he is bound, notwithstanding the absence of the party by whom it has been demanded, to proceed with reasonable diligence to comply with the demand of the next comer; and if the writ of the latter is ready before the former calls for his, he is nevertheless bound to deliver it as soon as it has been prepared. If, in such a case, the first comer loses his priority, such loss is due to his own negligence or misfortune.[9]

§ 48. To Whom Directed—Contents.—Under the section of the code applying to writs of attachment generally,

"The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached; in which case, to take such undertaking."[10]

In case the attachment has issued from a justice's court, however, "the writ may be directed to the sheriff or any constable of the county in which such justice court is sit-

9. Lick v. Madden, 25 Cal. 202 (decided under the Practice Act).

10. Code Civ. Proc., § 540; Callahan v. Danziger, 172 Cal. 738, 158 Pac. 760.

uate"; but it must require the sheriff to accept in lieu of the property about to be attached only an undertaking sufficient to satisfy the plaintiff's demand, besides costs.[11]

§ 49. Conformity With Complaint in Matter of Demand.—Section 540 of the Code of Civil Procedure expressly requires that the recital of the amount of the defendant's indebtedness in the writ shall conform to the statement of the same in the complaint.[12] That a writ cannot be sustained when issued for more than is demanded in the complaint is clear, since no judgment can exceed the amount so demanded.[13] And to say that more property of the defendant may be seized and held pending the action than can be necessary to satisfy the judgment demanded is so obviously wrong and without authority of law as to require neither argument nor authority to show it.[14] And when the complaint demands different amounts from the several defendants in an action, the writ must conform to the complaint and direct the attachment of so much property of the respective defendants as will secure the amount alleged to be due from each.[15]

But it does not follow, because an attachment cannot rightfully issue for more than is demanded in the complaint, that it may not properly issue for less. The word "conform" is not employed in the section as the equivalent of "identical," but rather as meaning "in correspondence in character and in harmony or congruity." The amount stated in the writ may be "in conformity with" the complaint without being the identical sum claimed, provided it does not exceed that sum,[16] and

11. Code Civ. Proc., § 868.

12. Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

13. Tibbet v. Tom Sue, 122 Cal. 206, 54 Pac. 741; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Ralphs v. Bruns, 22 Cal. App. 153, 133 Pac. 997.

14. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718, per Haynes, C.

15. Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

16. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

a writ of attachment is not defective because it states an amount less than that demanded in the complaint.[17] Such a construction leads to the conclusion that the demand stated in the writ must be in conformity with the complaint so far as its allegations authorize a writ of attachment. By so holding, full effect is given to all the provisions in the several code sections upon the subject.[18]

§ 50. Conformity With Affidavit.—The statute contains no requirement that the writ shall state the amount of the plaintiff's demand in conformity with the affidavit.[19] Nevertheless, it is conclusively established that the affidavit is the true basis of the writ.[20]. An attachment cannot be sustained which requires the taking of more of a defendant's property than is requisite to secure the indebtedness stated in the affidavit,[1] and where the amount stated in the affidavit is less than the amount demanded in the complaint, the writ must issue for the lesser amount.[2] The reason for the rule is apparent. It is not necessary that the complaint be verified in order to have an attachment, and the plaintiff may demand an amount that is many times more than he knows is justly due.[3] And, if the writ must issue for the amount so demanded, a door is opened for fraud and oppression for which the defendant has no redress other than an action for maliciously procuring the attachment for an excessive amount.[4] The apparent inconsistency between this construction of the

17. Hale Bros v. Milliken, 142 Cal. 134, 75 Pac. 653; Tibbet v. Tom Sue, 122 Cal. 206, 54 Pac. 741; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

18. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732.

19. O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465.

20. See supra, §§.25, 31.

1. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

2. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732; Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

3. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

4. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

law and the requirement of section 540 of the Code of Civil Procedure that the amount of the plaintiff's demand in the writ "must be stated in conformity with the complaint" is reconciled by the construction adopted by the courts that the amount stated in the writ may be "in conformity with" the complaint without being the identical sum claimed, provided it does not exceed that sum.[5]

§ 51. Defects and Irregularities—Amendment.—A writ of attachment is unauthorized unless issued in substantial conformity with the provisions of the statute.[6] It may be improperly issued because of defects or irregularities in the proceedings which precede it and upon which it is based. Thus, the absence of a proper affidavit as required by section 538 of the Code of Civil Procedure,[7] or the absence of a sufficient undertaking within the meaning of section 539 of the same code,[8] accompanied by an affidavit of the sureties containing the recitals required by section 1057,[9] will render the writ void. Or the writ may be ineffectual due to defects inherent in itself, as, for example, when it is issued for a greater amount than is demanded in the complaint,[10] or when it is issued for the entire amount demanded in the complaint, which includes unliquidated claims, instead of only for the amount stated in the affidavit.[11] An attachment issued before the issuance of the summons in the suit is void, and the subsequent issuance of the summons cannot cure it.[12] Likewise, a void summons will render an attachment invalid.[13] Collateral attack can never be sustained for causes which do

5. See supra, § 49.

6. Hisler v. Carr, 34 Cal. 641 (decided under the Practice Act).

7. See supra, § 25.

8. See supra, § 39.

9. See supra, § 41.

10. Tyson v. Reinecke, 25 Cal. App. 696, 145 Pac. 153. See supra, § 49.

11. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732.

12. Low v. Henry, 9 Cal. 538 (decided under section 120 of the Practice Act, which was the same as section 537 of the Code of Civil Procedure).

13. Hisler v. Carr, 34 Cal. 641.

not render the writ absolutely void and not merely voidable.[14]

The rules in regard to the amendment of defective writs of attachment are the same in general as those governing the amendment of the affidavit and undertaking.[15] No amendments were allowed prior to the amendment in 1909 of section 558 of the Code of Civil Procedure, it being held that this section limited and controlled the general provisions of section 473 of the same code, wherein amendments are allowed to pleadings in furtherance of justice.[16] As amended, however, this section expressly authorizes the amendment of writs which have been improperly or irregularly issued.[17]

§ 52. **Return Generally.**—Under sections 537 and 559 of the Code of Civil Procedure the sheriff may receive the writ with the summons, and in that event he is required to return it with the summons;[18] otherwise the return of the writ must be made "within twenty days after its receipt." Section 559 also requires that the return be made by the sheriff "with a certificate of his proceedings indorsed thereon or attached thereto."[19] The evident purpose of this requirement is to enable the court to decide upon its sufficiency to constitute a valid service,[20] and, as

14. Davis v. Baker, 88 Cal. 106, 25 Pac. 1108 (holding that the words "or thereabouts," after the statement of plaintiff's demand in the writ of attachment, do not render the attachment void on a collateral attack).

15. See supra, §§ 39, 40.

16. Sparks v. Bell, 137 Cal. 414, 70 Pac. 281; Tibbet v. Tom Sue, 122 Cal. 206, 54 Pac. 741; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

17. Jensen v. Dorr, 157 Cal. 437, 108 Pac. 320; Tyson v. Reinecke, 25 Cal. App. 696, 145 Pac. 153; Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331.

18. Maskey v. Lackmann, 146 Cal. 777, 81 Pac. 115.

19. Maskey v. Lackmann, 146 Cal. 777, 81 Pac. 115; Brusie v. Gates, 80 Cal. 462, 22 Pac. 284; Sharp v. Baird, 43 Cal. 577 (decided under the Practice Act, § 141).

20. Brusie v. Gates, 80 Cal. 462, 22 Pac. 284; Sharp v. Baird, 43 Cal. 577 (decided under the Practice Act).

a result, it is generally held that a general return that the property has been attached is insufficient.[1] Some of the earlier cases, however, support the contrary view.[2] It would seem that a general return would be sufficient against a collateral attack, at least,[3] and when an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession.[4]

If the officer states in his return that he did certain acts, as constituting the levy, which do not make the levy valid, subsequent attaching creditors or purchasers have the right to rely upon such return as one stating, in effect, that the acts named were all the acts done by him.[5] But where the officer states in general terms that he served the writ by attaching the property, the fact that he proceeds to state in addition that he did certain acts, specifically naming them, is not sufficient to entitle a subsequent purchaser to reject the general statement in the return and maintain that he did nothing except what is specifically set out.[6]

Although an attachment will not bind property not described in the return,[7] the validity of an attachment can-

1. Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619; Brusie v. Gates, 80 Cal. 462, 22 Pac. 284; Gates v. McLean, 70 Cal. 42, 11 Pac. 489; Watt v. Wright, 66 Cal. 202, 5 Pac. 91; Sharp v. Baird, 43 Cal. 579 (decided under the Practice Act).

2. Porter v. Pico, 55 Cal. 165; Wingard v. Banning, 39 Cal. 543; Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775.

3. Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

4. O'Connor v. Blake, 29 Cal. 312 (decided under the Practice Act).

5. Brusie v. Gates, 80 Cal. 462, 22 Pac. 284; Watt v. Wright, 66 Cal. 202, 5 Pac. 91; Sharp v. Baird, 43 Cal. 577 (construing section 141 of the Practice Act, the wording of which was the same as that of section 559 of the Code of Civil Procedure); Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287 (decided under the Practice Act); Newhall v. Provost, 6 Cal. 85 (decided under the Practice Act).

6. Brusie v. Gates, 80 Cal. 462, 22 Pac. 284.

7. Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287 (decided under the Practice Act).

not be attacked for a misdescription of the property contained in the return where such description is sufficient to notify a purchaser of the same and to enable the sheriff to identify the same.[8]

Amendment of return.—The return of the writ may be amended, but a sheriff has no right to amend so as to affect rights which have already vested.[9] A mistake in the date of the sheriff's return may be corrected at any time.[10]

§ 53. Return as Evidence.—The return of the sheriff of matters material to be returned upon a writ of attachment is evidence of the validity of the attachment.[11] It may be conclusive where the rights of strangers have intervened.[12] It is not conclusive, however, as between the parties to the attachment suit and those claiming under them,[13] and if the sheriff simply omits to state any fact necessary to a valid service, such fact may be supplied by other evidence.[14] The lien of the attaching creditor is not dependent upon the return of the officer, but upon the levy made by him.[15] It has been held that the return may be aided by parol evidence.[16] But since the sheriff is required to make his return in writing, the propriety

8. Godfrey v. Monroe, 101 Cal. 224, 35 Pac. 761.

9. Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287 (decided under the Practice Act); Newhall v. Provost, 6 Cal. 85 (decided under the Practice Act).

10. Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775 (decided under the Practice Act).

11. Maskey v. Lackmann, 146 Cal. 777, 81 Pac. 115.

12. See supra, § 52.

13. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; Blanc v. Paymaster Mining Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775 (decided under the Practice Act).

14. Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156 (entries in sheriff's books held admissible); Brusie v. Gates, 80 Cal. 462, 22 Pac. 284; Porter v. Pico, 55 Cal. 172; Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775.

15. Brusie v. Gates, 80 Cal. 462, 22 Pac. 284.

16. Sinsheimer v. Whitely, 111 Cal. 378, 52 Am. St. Rep. 192, 43 Pac. 1109; Davis v. Baker, 72 Cal. 494, 14 Pac. 102.

of permitting his acts to be shown by parol is open to serious question, and where such proof is allowed, the evidence must be clear and satisfactory.[17]

VII. PROCEEDINGS IN PRINCIPAL ACTION.

§ 54. Character of Action—In Personam, in Rem.—Strictly speaking, an action in which an attachment has issued is a proceeding in personam and not in rem.[18] The effect of levying an attachment against the property of the defendant is merely to create a lien on that property as security for any judgment that might be recovered against him. The attached property does not thereby become the subject of the action. The subject of the action consists, as from the outset, of the plaintiff's demand.[19] However, when the court proceeds without jurisdiction of the person of the defendant, the action partakes to a certain degree of the nature of one in rem against the attached property.[20] The proceedings are, in reality, directed against the attached property, and the validity of the decree of the court is dependent upon the seizure of property.[1]

In a leading case the supreme court of the United States has laid down the following rule with reference to attachment suits against nonresidents:

"If the defendant appears the cause becomes mainly a suit in personam, with the added incident that the property attached remains liable under the control of the court to answer to any demand which may be established

17. Brusie v. Gates, 80 Cal. 462, 22 Pac. 284.

18. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 21, 53 Pac. 444, not sustained); Low v. Adams, 6 Cal. 277 (decided under the Practice Act). See supra, § 1. As to general distinctions between actions in personam and in rem, see ACTIONS, vol. 1, p. 323.

19. Anderson v. Schloesser, 153 Cal. 219, 94 Pac. 885.

20. Wait v. Kern River Mining Co., 157 Cal. 16, 106 Pac. 98.

1. See infra, §§ 55, 64.

against the defendant by the final judgment of the court; but if there is no appearance of the defendant, and no service of process upon him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."[2]

This rule is recognized and followed by the California courts.[3]

§ 55. Necessity for Jurisdiction of Defendant's Property.—Where personal service is obtained on the defendant, the attachment is simply auxiliary to the main action and in no wise necessary to the jurisdiction of the court.[4] However, in attachment proceedings against a nonresident defendant where personal service is lacking, it is elementary that the court must obtain jurisdiction of property of the defendant located within the state, by the levy of a writ.[5] Without this, the court has no jurisdiction to render any judgment in the action.[6] If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the property is established.[7]

2. Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. Ed. 931, per Miller J. (followed by Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565).

3. Wait v. Kern River Mining Co., 157 Cal. 16, 106 Pac. 98; Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444, 115 Pac. 58; Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

4. In re Hall & Stilson, 73 Fed. 527.

5. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147 (citing the leading cases, Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. Ed. 931; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565). See LEVY AND SEIZURE.

6. Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Belcher v. Chambers, 53 Cal. 635 (citing the leading case, Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565); Smith v. Supreme Lodge A. O. U. W., 12 Cal. App. 189, 106 Pac. 1102.

7. Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147

The property having been attached, the court acquires jurisdiction to render judgment to the extent thereof, notwithstanding the fact that the owner is a nonresident. The right of a state through its tribunals to subject property situated within its limits owned by nonresidents to the payment of demands against them, and the fact that this jurisdiction in no way infringes upon the sovereignty of the state where the owners are domiciled, are too well settled to admit of argument.[8] It is clear, however, that the levy of a writ issued in an action in which attachment will not properly lie under section 537 of the Code of Civil Procedure, upon property of a nonresident who is served with summons by publication, will not confer jurisdiction over such property.[9]

§ 56. Issuance and Service of Summons Generally.—The issuance and service of a summons is as indispensable in an action in which attachment has issued or is to issue as in any other action,[10] and the attachment will fail unless supported by a valid summons.[11] The writ is not constituted a substitute for the summons.[12] Section 537 of the Code of Civil Procedure contemplates the commencement of an action by the issue of summons prior to, or at least at the same time as, the issue of the writ of attachment.[13]

Concealment of defendant.—An attachment is not vitiated by failure to serve the summons due to the fact that the defendant had concealed himself to avoid service of process. Otherwise, it would only be necessary for a

(quoting from Cooper v. Reynolds, 10 Wall. (U. S.) 319).

8. Belcher v. Chambers, 53 Cal. 635.

9. Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147.

10. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; Smith v. Supreme Lodge A. O. U. W., 12 Cal. App. 189, 106 Pac. 1102. See PROCESS.

11. Hisler v. Carr, 34 Cal. 641.

12. Smith v. Supreme Lodge A. O. U. W., 12 Cal. App. 189, 106 Pac. 1102.

13. Low v. Henry, 9 Cal. 538 (decided under section 120 of the Practice Act). See supra, § 46.

debtor to conceal himself for a few days, until the return day of a summons issued against him had passed, to invalidate any attachment which had been issued against him. The plaintiff in such case is entitled to a new summons and a continuance of the case until such time as he can procure a service of the same, by publication or otherwise, and the suit is not abated or determined thereby, nor is the attachment in any way affected by the proceeding.[14]

Nonresidents.—Where the proceeding is against a nonresident, the law requires the issuance of a summons, the issuance of a writ of attachment, and valid levy of the same upon defendant's property situated in this state; also an order for publication of summons based upon the necessary affidavit and a due service of summons by publication. All these steps must be taken to give the court jurisdiction to enter final judgment against the defendant to the end that the property of defendant might be applied in a lawful way to the satisfaction of the plaintiff's cause of action.[15] But so far as the jurisdiction of the court is concerned, the order of these several steps is immaterial.[16]

§ 57. Service by Publication.—In an action where an attachment is sought, the proceeding for the publication of summons is distinct and separate from the proceeding in attachment. The validity of a judgment against a nonresident is dependent upon both these proceedings, but neither of them is dependent upon the other.[17] The jurisdiction of the court to make the order of publication rests

14. Seaver v. Fitzgerald, 23 Cal. 85 (construing sections of the Practice Act similar to those of the present code). See PROCESS.

15. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; Smith v. Supreme Lodge, A. O. U. W., 12 Cal. App. 189, 106 Pac. 1102.

16. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240.

17. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; Smith v. Supreme Lodge, A. O. U. W., 12 Cal. App. 189, 106 Pac. 1102.

altogether upon the affidavit for publication showing the facts required by the provision of section 412 of the Code of Civil Procedure. It is not required in this section or elsewhere in the law that it shall be made to appear by affidavit or otherwise that a writ of attachment has been levied as a preliminary step to the order of publication.[18] The defendant in the action will be presumed to know that he has property in the state, and service of summons by publication as directed by the code will serve as notice to him that if he does not appear and defend against the action, the plaintiff will not only take judgment against him, but he is liable to take also such steps preliminary thereto as will make that judgment effective as against said property. He is bound to take knowledge of the code and know that the plaintiff can fully avail himself of the attachment law of the state without giving him any actual notice thereof.[19] But notwithstanding the publication of summons, jurisdiction to proceed is not obtained until the court has brought under its jurisdiction, by levy of attachment, property belonging to the defendant within the state.[20] Although an attachment is sought against the wife's separate estate, jurisdiction of the husband as codefendant may be obtained by publication of summons against him where he cannot be personally served therewith.[1] By an attachment where there is no personal service of summons the court simply acquires the right to

18. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73. See PROCESS.

19. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; First Nat. Bank v. Eastman, 144 Cal. 487, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043 (quoting from Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565).

20. Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; First Nat. Bank v. Eastman, 144 Cal. 487, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Belcher v. Chambers, 53 Cal. 635; Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (the leading case).

1. Bank of Venice v. Hutchinson, 19 Cal. App. 219, 125 Pac. 252.

apply the property to the satisfaction of whatever may be found due the plaintiff; that is, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in the suit.[2]

§ 58. Appearance by Defendant.—Section 1014 of the Code of Civil Procedure defines what shall constitute an appearance. A defendant appears in an action when he answers, demurs or gives written notice of his appearance, or when an attorney gives notice of an appearance for him, and he can appear in no other way.[3] Where no summons has been served upon the defendant in an attachment suit, the mere exception by him to sureties on the attachment bond cannot constitute an appearance in the action, or authorize the entry of the default of the defendant, or of a judgment by default against him. In excepting to the sufficiency of sureties the defendant is not required to appear in court. Such notice does not even contemplate his appearance therein for any purpose; neither does it contemplate an application to the court for any relief whatsoever. To so hold would not only violate the express provisions of section 539 of the Code of Civil Procedure, but impose a penalty upon the defendant, whether resident or nonresident, by requiring him to subject himself to the jurisdiction of the court as a condition of exercising the right conferred by statute.[4] Nor does the mere giving of a notice of a motion to be made at a certain time and place for the dissolution of an attachment issued in the cause constitute such an appearance.[5] If, however,

2. Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

3. See APPEARANCE, ante, p. 1.

4. Salmonson v. Streiffer, 13 Cal. App. 395, 110 Pac. 144. Section 539 of the Code of Civil Procedure entitled "Undertaking on attachment. Executions to sureties," provides: " . . . At any time after the issuing of the attachment but not later than five days after actual notice of the levy thereof the defendant may except to the sufficiency of the sureties. . . . "

5. Salmonson v. Streiffer, 13 Cal. App. 395, 110 Pac. 144; Glidden v. Packard, 28 Cal. 649 (decided under the Practice Act).

pursuant to such notice, the attorney appears in court and makes the motion, such act on the part of the attorney would be sufficient to constitute an appearance.[6] Although an attachment may be dismissed because of its invalidity, the plaintiff is entitled to proceed for a verdict and general judgment on his complaint if the defendant has appeared and made defense.[7]

§ 59. Allegations of Complaint—Prayer for Relief.—An attachment, regular upon its face, is not void because the complaint does not set up a cause of action which would warrant the issuance of an attachment.[8] Yet, the plaintiff should show affirmatively that his cause of action falls within the provision of section 537 of the Code of Civil Procedure,[9] and that his claim is either legally or equitably due.[10] It is not essential, however, that the complaint contain the recitals required to appear in the attachment affidavit by section 538 of the Code of Civil Procedure. The plaintiff need not state, under oath or otherwise, the specific amount due,[11] or that the indebtedness has not been secured.[12] And he need not anticipate or state any counterclaim or setoff the defendant may have against him, or even allege that the amount of indebtedness stated is over and above all legal setoffs or counterclaims. He may state the whole of his demand without regard to setoffs or counterclaims, deducting payments only.[13]

6. Salmonson v. Streiffer, 13 Cal. App. 395, 110 Pac. 144.

7. Allender v. Fritts, 24 Cal. 447 (decided under the Practice Act); Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

8. McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115 (decided under the Practice Act).

9. Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Drake v. De Witt, 1 Cal. App. 617, 82 Pac. 982.

10. See cases cited supra, § 19.

11. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

12. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

13. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

Prayer.—The fact that the prayer of the complaint is also for relief to which the remedy of attachment does not extend will not defeat the plaintiff's right to attachment.[14] On the other hand, a complaint in an action for money, although containing no prayer for relief, is sufficient as a basis for a writ of attachment, where the pleading is accompanied by the affidavit and undertaking required by the statute, notwithstanding that in such form, no answer having been filed, it would not support a judgment.[15]

§ 60. Misnomer and Nonjoinder of Parties.—Misnomer, in a complaint and proceedings upon attachment, will not affect the attachment, and the error is waived by an appearance and answer of the defendant in his true name.[16] But where property has been attached which belongs to one not made a party to the suit, the attachment is without effect; and the attachment having been executed and returned, its defects are not cured by the amendment of the complaint so as to make the owner of the property a party defendant if no additional steps are taken to perfect the lien.[17] In attachment proceedings against a corporation which has reorganized under a new name, but with practically the same directors and stockholders, and which has continued to carry on the same business, it is not necessary to make the former corporation a party defendant.[18] It has been held that on the failure by a plaintiff to deny an affidavit of a defendant, made on motion to dissolve an attachment, and correcting

14. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

15. Hoffman v. Pacific Coast Const. Co., 37 Cal. App. 125, 173 Pac. 776 (decided under the Practice Act).

16. Hammond v. Starr, 79 Cal. 556, 21 Pac. 971 (in this case the word "company" was omitted from the name of a corporation defendant).

17. Collins v. Montgomery, 16 Cal. 398 (decided under the Practice Act).

18. Stanford Hotel Co. v. Schwind Co., 180 Cal. 348, 181 Pac. 780.

a misnomer of the defendants by the complaint, the allegations of such affidavit will be deemed true.[19]

§ 61. Joinder of Several Causes.—Section 427 of the Code of Civil Procedure authorizes a plaintiff to unite in his complaint several causes of action where they all arise out of contracts; and under this section the plaintiff in attachment may unite with a cause of action upon a contract for the direct payment of money another cause arising out of contract wherein the damages for its breach are unliquidated, and for which he is not entitled to a writ of attachment. He may also unite in his complaint several causes of action upon contracts for the direct payment of money, one of which may be secured by a pledge of personal property while the others are unsecured.[20]

§ 62. Amendment of Complaint.—Unless the complaint, in a suit where attachment is sought, shows upon its face that the plaintiff has no cause of action with the help of an amendment, the attachment should not be dissolved.[1] A complaint in such an action which is merely defective and not incurable may be amended in accordance with rules governing amendments of pleadings generally,[2] without affecting the attachment lien,[3] or the plaintiff's security, in case the attached property has been released,[4] providing the character of the action is not thereby changed.[5] But it is essential to the validity of the attachment that

19. Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

20. Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732. See generally, as to joinder of causes of action, ACTIONS, vol. 1, p. 345 et seq.

1. Hathaway v. Davis, 33 Cal. 161 (decided under the Practice Act); Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

2. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653. See PLEADING.

3. Hammond v. Starr, 79 Cal. 556, 21 Pac. 971.

4. Michelin Tire Co. v. Bentel, 60 Cal. Dec. 565, 193 Pac. 770. See infra, §§ 91–108, as to release of attachment.

5. Michelin Tire Co. v. Bentel, 60 Cal. Dec. 565, 193 Pac. 770; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Ralphs v. Bruns, 22 Cal. App. 153, 133 Pac. 997.

the writ state the amount of the demand in conformity with the complaint as amended.[6]

Although it is well settled that such an amendment may be made while a motion to dissolve an attachment is pending,[7] it seems to be undecided whether or not the amendment must be made before the court renders a decision upon such a motion.[8] Among others, defects in parties may be cured in this manner,[9] and the allegation of the amount of the defendant's indebtedness may be varied.[9a] An objection that the amendment states a different cause of action from that declared on in the original complaint cannot be urged for the first time in a collateral suit on a bond given for release of the attachment.[10]

§ 63. Judgment in General.—The judgment in a suit where an attachment has been issued does not differ from that entered in other cases upon a money demand.[11] Neither the action nor the judgment in any manner depends upon the attachment, but the judgment is precisely the same whether the attachment proceedings are valid or not,[12] and an error in relation to the attachment proceedings is not ground for the reversal of the judgment or of an

6. Ralphs v. Bruns, 22 Cal. App. 153, 133 Pac. 997.

7. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Hammond v. Starr, 79 Cal. 556, 21 Pac. 971; Hathaway v. Davis, 33 Cal. 161 (decided under the Practice Act).

8. Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911. But see Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969 (in this case the court said: "If a motion to dissolve is made on this ground, the plaintiff must amend his complaint before the decision of the motion to dissolve, or it will be presumed that he cannot do so").

9. Collins v. Montgomery, 16 Cal. 398 (decided under the Practice Act); Heath v. Lent, 1 Cal. 410 (decided under the Practice Act).

9a. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653.

10. Hammond v. Starr, 79 Cal. 556, 21 Pac. 971.

11. Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73. See JUDGMENT.

12. Allender v. Fritts, 24 Cal. 447 (decided under the Practice Act); Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

order denying a new trial.[13] But the judgment can in no case be enforced against specific property of the defendant unless such property has been seized under a valid levy of attachment.[14]

The lien acquired by means of the attachment does not necessarily attend the action, without regard to the judgment that may be rendered, and when the action is of such a character, or its condition has become such due to change of parties or other cause, that a judgment cannot be rendered against the defendant in personam, an order to satisfy the judgment out of property of the defendant cannot issue.[15] Thus, if the defendant dies before judgment and the action proceeds against his administrator, the court has no power to order the attached property sold in satisfaction of a judgment for the plaintiff.[16]

Costs.—Fees for serving writs of attachment and notary fees in the matter of the affidavit and bond for the attachment are proper items of cost in an action in which an attachment is proper.[17] But it has been held that expenditures made by a sheriff for fire insurance premiums on property attached are not proper items of costs.[18]

§ 64. Judgment Against Nonresident.—In an action against a nonresident for the recovery of money, when there has been no personal service of process on the defendant within the state and no appearance therein by him, no judgment can be given, other than one in the nature of or having the effect of a judgment in rem, against such property of the nonresident as may have

13. Herman v. Paris, 81 Cal. 625, 22 Pac. 971.

14. Blanc v. Paymaster Mining Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

15. Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49 (decided under the Practice Act).

16. Bank of Stockton v. Howland, 42 Cal. 129 (construing the Practice Act); Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49 (construing the Practice Act).

17. Kinkade v. Champion Horse Shoe Co., 32 Cal. App. 425, 163 Pac. 228.

18. Galindo v. Roach, 130 Cal. 389, 62 Pac. 597. See COSTS.

been specifically attached, and the judgment of the court, though in form of a personal judgment, has no effect beyond such property.[19] But the fact that a judgment in such action is general in its terms for the recovery of money only, and makes no reference to the fact that any property has been attached therein, does not render it void, if in fact such attachment was made.[20] A judgment against a nonresident defendant, who has not appeared, for the sale of his attached property, cannot be sustained where the recovery against him is only upon a cause of action for which no attachment could lawfully issue.[1] Where a nonresident defendant has voluntarily appeared, the court may, of course, render a personal judgment against him without reference to the property which has been seized by the attachment in the action.[2]

§ 65. Satisfaction of Judgment.—A judgment for the plaintiff operates to establish the justness of his claim,[3] and the code prescribes the manner in which the judgment shall be satisfied. Section 550 of the Code of Civil Procedure provides as follows:

"If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him

19. Anderson v. Schloesser, 153 Cal. 219, 94 Pac. 885; First Nat. Bank v. Eastman, 144 Cal. 487, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043; Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433; Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 795, (action against a foreign corporation which had no managing agent or other officer in the state upon whom personal service of summons could be made); Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Belcher v. Chambers, 53 Cal. 635; Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444, 115 Pac. 58; Smith v. Supreme Lodge A. O. U. W., 12 Cal. App. 189, 106 Pac. 1102; Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351; Pennoyer v. Neff, 95 U. S. 741, 24 L. Ed. 565; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931.

20. Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

1. Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147. See infra, § 69.

2. Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

3. Brickman v. Ross, 67 Cal. 601, 8 Pac. 316 (quoting from Drake on Attachments); San Francisco Sulphur Co. v. Aetna Indem. Co., 11 Cal. App. 695, 106 Pac. 111.

which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose: 1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment; 2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution."

And section 551 of the same code provides that

"If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance, as upon an execution in other cases."

By force of section 688 of the Code of Civil Procedure, "all property and rights of property seized and held under attachment in the action are liable to execution," and it is held that under a proper construction of this section and section 550, no order of sale by the court is necessary to authorize the sheriff to sell attached property.[4] The court, in rendering the judgment has no duty to perform in reference to the attachment proceedings, and the sheriff does not act in obedience to the judgment, but to the behests of the statute, in enforcing the attachment lien by the sale of the property attached.[5] Hence, the lien of the attachment is not lost by a simple money judgment without embodying therein directions for the sale of the attached property.[6]

4. Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Low v. Henry, 9 Cal. 538 (decided under similar provisions of the Practice Act).

5. Myers v. Mott, 29 Cal. 359, 89 Pac. 49 (construing the Practice Act).

6. Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

When the lien of an attachment is satisfied, the property not disposed of in satisfaction of the lien, as well as the surplus moneys that may remain after the sheriff's sale and satisfaction of the debt, remain subject to the rights of the judgment debtor or his assignee.[7]

§ 66. Effect of Judgment for Defendant.—The rights secured by an attachment being merely contingent and dependent upon the recovery of judgment by the plaintiff, it necessarily follows that a final judgment for the defendant ipso facto works a dissolution of the attachment,[8] and gives the defendant a right of action upon the undertaking given by the plaintiff in order to procure the attachment.[9]

According to a number of decisions rendered under section 553 of the Code of Civil Procedure prior to the amendments of 1907 and 1909, any judgment for a defendant in attachment operated to dissolve an attachment,[10] or, the property having been released on an undertaking, to discharge the sureties thereon,[11] regardless of an appeal being taken.[12] These decisions however, were, to a certain extent, overruled, it being held that an attachment plaintiff might, by perfecting his appeal and filing the

7. Code Civ. Proc., § 551; Sexey v. Adkinson, 40 Cal. 408 (decided under a similar provision of the Practice Act).

8. Kast v. California Corporation (Pacific Surety Co.), 32 Cal. App. Dec. 598; Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669; Aigeltinger v. Whelan, 133 Cal. 110, 65 Pac. 125.

9. Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18. See supra, §§ 39–42, as to undertaking to procure attachment; and infra, §§ 128, 129, as to damages recoverable thereon.

10. Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758; Loveland v. Alvord etc. Min. Co., 76 Cal. 562, 18 Pac. 682; O'Connor v. Blake, 29 Cal. 312 (decided under a similar provision of the Practice Act).

11. Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758.

12. Prior to 1907 the section provided as follows: "If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands must be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom."

undertaking required by section 946 of the Code of Civil Procedure, neutralize the dissolvent force of the judgment.[13] Such is the rule under section 553 as amended in 1909, and it is held that the section clearly contemplates that, upon the attachment being dissolved by a judgment for the defendant, all proceedings in the attachment shall become of no effect, and that an undertaking given to procure the release of attached property shall fall with the proceedings upon which it was based regardless of whether it is a statutory undertaking or a common-law bond.[14]

§ 67. Effect of Appeal.—Prior to its amendment in 1909, section 553 of the Code of Civil Procedure contained no effective provision for the continuance of an attachment pending an appeal by the plaintiff from a judgment in favor of the defendant.[15] As amended in 1909 this section provides as follows:

"If the defendant recovers judgment against the plaintiff, and no appeal is perfected and undertaking executed and filed as provided in section nine hundred and forty-six of this code, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom."[16]

13. Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786.

14. Kast v. California Surety Co., 32 Cal. App. Dec. 598 (citing Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758). The section as amended in 1909 is quoted infra, section 67.

15. Loveland v. Alvord Mining Co., 76 Cal. 562, 18 Pac. 682.

16. Section 553, Code of Civil Procedure, as it read prior to the amendment of 1909, is set forth in the notes to the preceding section of this article. Section 946 of the Code of Civil Procedure provides: "An appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sus-

If the required undertaking is filed, a properly perfected appeal by the plaintiff continues the force and effect of the attachment proceedings, and preserves his rights against the attached property, or, if an undertaking has been executed for the release of the property, against the sureties upon such undertaking.[17] But an appeal, though properly perfected, will not continue these rights in force if no undertaking is filed;[18] nor are they revived by a reversal of the judgment.[19]

If the lien of an attachment on real property is continued by an order of the court without legal authority, pending an appeal by the plaintiff from a judgment in favor of the defendant, the remedy of the defendant, by appeal from the order, is neither speedy nor adequate, and as the effect of the order is to impose a continuing restraint on the defendant's right to the free, untrammeled enjoyment of his property, he is entitled to a writ of prohibition restraining the court from continuing the attachment. Under such circumstances the order will not be deemed a completed judicial act.[20]

A bond given by a defendant to prevent the levy of an attachment is not affected by an appeal from a judgment in favor of the plaintiff. Pending the appeal, however, the bond cannot be enforced.[1] Notwithstanding an appeal be taken from its judgment, the trial court still retains jurisdiction of the attachment proceedings, with power to take such steps therein as may be necessary to preserve

tained; and unless, within five days after the entry of the order appealed from, such appeal be perfected."

17. Kast v. California Surety Co., 32 Cal. App. Dec. 598; Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786 (decided prior to the amendment of section 553 of the Code of Civil Procedure in 1909 but construing that section in connection with section 946 of the same code). See APPEAL AND ERROR, § 224, vol. 2, p. 474.

18. Kast v. California Security Co., 32 Cal. App. Dec. 598; Clark v. Superior Court, 37 Cal. App. 732, 174 Pac. 681.

19. Kast v. Pacific Surety Co., 32 Cal. App. Dec. 598.

20. Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786.

1. Ayres v. Burr, 132 Cal. 125, 64 Pac. 120. See infra, §§ 88–90, as to prevention of attachment.

the rights of the parties.[2] It has been held that an appellant is not injured by the action of the trial court in ordering the discharge of an attachment after it has lost jurisdiction of the action by reason of the taking of an appeal, if the attachment was confessedly improperly issued.[3]

§ 68. Appellate Procedure.—According to the general trend of the decisions, questions in relation to the regularity of attachment proceedings cannot be considered on appeal from the judgment in the principal action.[4] Such proceedings are purely ancillary to the main action, and in no way affect the validity of the judgment therein.[5] Furthermore, an appeal lies from an order dissolving or refusing to dissolve an attachment,[6] and appealable orders are expressly excepted from the matters to be reviewed upon appeal from the judgment.[7]

The rule is the same whether the appeal is from a justice's court or a court of record, and if the transmission of all the papers in a cause to the superior court on appeal be to vest that court with jurisdiction of an attachment proceeding pending in connection therewith, such

2. Karry v. Superior Court, 162 Cal. 281, 122 Pac. 475, 128 Pac. 760; Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902 (citing Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Broder v. Conklin, 121 Cal. 289, 53 Pac. 797).

3. Lapique v. Plummer, 168 Cal. 310, 142 Pac. 1079.

4. Herman v. Paris, 81 Cal. 625, 22 Pac. 971; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Allender v. Fritts, 24 Cal. 447 (decided under the Practice Act). See Fresno Planing Mill Co. v. Manning, 20 Cal. App. 766, 130 Pac. 196 (the court declared that in the absence of a showing in the record that a writ of attachment had been issued in the action, the question of the plaintiff's right to such a writ would not be considered on appeal).

5. See supra, § 63.

6. Code Civ. Proc., § 963; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Kennedy v. Merikel, 8 Cal. App. 378, 97 Pac. 81. See infra, § 118, as to appeal from order dissolving or refusing to dissolve an attachment.

7. Kennedy v. Merikel, 8 Cal. App. 378, 97 Pac. 81 (citing Code Civ. Proc., § 956).

jurisdiction is not for the purpose of reviewing the rulings of the justice court in connection with the attachment, but as incidental to the execution of the judgment which may be rendered in the principal action, and mandamus will not lie to compel it to review the same.[8]

§ 69. Action to Set Aside Judgment.—A court of equity, at the instance of a surety on a bond given to release an attachment issued in an action against an attachment debtor, will not set aside a judgment regularly obtained and entered against the latter in the attachment action, in the absence of a showing of fraud, mistake or collusion, in obtaining the judgment. A complaint by the surety in an action seeking such relief, which fails to allege one of such grounds, is demurrable. And if it affirmatively appears from the face of the complaint in such an action that the surety has been guilty of laches, and has waited a period of several months after the entry of judgment against the attachment debtor before seeking to set it aside, during which interval the situation of the property formerly owned by the attachment debtor has changed so that the judgment creditor has lost all possible chance of recovery on its claim from any source other than the bond, the surety will not be granted the relief sought.[9]

A nonresident defendant may appear specially for the purpose of moving to vacate a void personal judgment. However, the judgment having been set aside, the plaintiff is still entitled to the remedy by attachment, if he can find any of the property of the defendant in the state upon which to make a levy.[10]

8. Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902. See, also, APPEAL AND ERROR, vol. 2, p. 82.

9. American Surety Co. v. City Street Imp. Co., 169 Cal. 172, 146 Pac. 428.

10. Smith v. Supreme Lodge A. O. U. W., 12 Cal. App. 189, 106 Pac. 1102.

VIII. LIEN OF ATTACHMENT.

In General.

§ 70. Nature and Creation.—As distinguished from a lien of a judgment on land, an attachment properly levied creates a specific and not a general lien.[11] However, the levy does not give the court whence the process issued either actual or constructive possession of the property. And it does not affect the title of the debtor to the attached property,[12] nor prevent him from transferring it subject to the lien.[13]

An attachment lien does not become effective when the attachment is issued, but only from the time that the officer executing the writ has complied with the law.[14] And in order to create a lien, the requisite acts must not only be performed by the officer, but they must be performed in the order prescribed by the statute.[15] In executing a writ of attachment upon realty, the failure of the officer to leave with the occupant or post upon the land, where it is not occupied, a copy of the description of the land, in connection with a copy of the writ of attachment, and of the notice that the land had been attached, is fatal to the validity of the levy, and no lien is created thereon.[16]

11. Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669. As to the levy of the attachment, see LEVY AND SEIZURE.

12. In re Hall & Stilson Co., 73 Fed. 527 (construing subdivision 1 of section 542 of the Code of Civil Procedure).

13. Riley v. Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315 (real property). See infra, § 72; Howe v. Johnson, 117 Cal. 37, 48 Pac. 978 (personal property).

14. Herron v. Hughes, 25 Cal. 556; Taffts v. Manlove, 14 Cal. 47, 73 Pac. 610; Whitney v. Butterfield, 13 Cal. 335, 73 Am. Dec. 564; Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775 (these cases were decided under the Practice Act). See LEVY AND SEIZURE.

15. Main v. Tappener, 43 Cal. 206; Sharp v. Baird, 43 Cal. 577 (these cases were decided under the Practice Act). See LEVY AND SEIZURE.

16. Code Civ. Proc., § 552, subd. 1; Maskell v. Barker, 99 Cal. 642, 34 Pac. 340; Brusie v. Gates, 96 Cal. 265, 31 Pac. 111; Davis v. Baker, 72 Cal. 494, 14 Pac. 102 (holding that a posting of the

Similarly, a levy made by an officer on goods which he does not see or have in his possession is void.[17] But the mere fact that the sheriff has made a defective return will not affect the general validity of the lien of an attachment duly levied.[18] The lien is not affected by mere irregularities or defects in the proceedings to procure the attachment, and they are deemed waived unless taken advantage of by the defendant by motion or otherwise.[19]

§ 71. Extent of Lien.—The general rule is that a creditor who attaches property for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy, and that if, at that time, all title and interest therein had passed from the debtor to a third person, the creditor gets nothing by the levy.[20] Even if the debtor has an equitable interest in land subject to attachment, the lien is subject to all existing equities.[1] Thus, if an attachment has been levied upon the property of mortgagors, and the land is later sold by the sheriff under foreclosure sale, the deed subsequently exe-

notice on the most conspicuous spot on the land is sufficient); Schwartz v. Cowell, 71 Cal. 306, 12 Pac. 252; Watt v. Wright, 66 Cal. 202, 26 Pac. 1071; Sharp v. Baird, 43 Cal. 577; Main v. Tappener, 43 Cal. 206; Wheaton v. Neville, 19 Cal. 44.

17. Code Civ. Proc., § 542, subd. 2; Herron v. Hughes, 25 Cal. 555; Taffts v. Manlove, 14 Cal. 47, 73 Am. Dec. 610 (these cases were decided under the Practice Act). See LEVY AND SEIZURE.

18. See supra, §§ 52, 53.

19. See supra, § 24.

20. Stradley v. Union Trust Co., 41 Cal. App. 17, 181 Pac. 823; National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590, 35 Pac. 170; Ward v. Waterman, 85 Cal. 488, 24 Pac. 930; Smith v. Cunningham, 67 Cal. 262, 7 Pac. 679 (crops grown upon land by a person in the actual, exclusive and adverse possession thereof, cannot be attached as the property of the legal owner of the land); Howell v. Foster, 65 Cal. 173, 3 Pac. 647; Whitney v. McCoy, 60 Cal. 627; De Celis v. Porter, 59 Cal. 464; Tuohy v. Wingfield, 52 Cal. 319; Bosbyshell v. Cline, 34 Cal. App. Dec. 371, 196 Pac. 274.

1. Ward v. Waterman, 85 Cal. 488, 24 Pac. 930; De Celis v. Porter, 59 Cal. 464; O'Rourke v. O'Connor, 39 Cal. 442 (decided under the Practice Act).

cuted by the sheriff extinguishes the interest which the mortgagors had at the date of the attachment.[2] However, where a statute declares a previous transfer of title void as to creditors of the transferrer, there is an exception to this rule. The exception is of course founded upon the theory that as the law makes the transfer void as to the creditor, there is, as to him, no transfer at all, and the title to the property, for his benefit, remains in the debtor, notwithstanding a previous legal transfer good as against all other parties. Notice to the creditor, or to an intending purchaser, in such a case, that the third person holds the title, whether given before or after the levy, does not affect the attachment, nor invalidate the title of the execution purchaser.[3] An attachment levied upon land which is subject to a deed of trust constitutes a lien on funds remaining in the hands of the trustees after they have sold the land and, from the proceeds of the sale, satisfied the debt secured by the deed of trust.[4]

§ 72. Effect of Transfer of Property After Levy.—An attachment lien does not in any way affect the general title of the owner of the property, and, therefore, property under attachment may be conveyed by the owner subject to the attachment.[5] On the other hand, a transfer of property subject to an attachment does not interfere with the rights of the attachment creditor,[6] nor will the execution of a mortgage upon the property after the attachment has been levied.[7] The grantee or the mortgagee, as the case may be, takes only the interest which the grantor or

2. Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120.

3. National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

4. Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433.

5. See supra, § 70.

6. Martinovich v. Marsicano, 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333.

7. Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775 (decided under the Practice Act).

mortgagor has at the time of the transfer.[8] But after all valid liens are satisfied he is entitled to what remains; or he may pay the claims and take the property.[9] If an attachment is properly levied upon real property devised by the will of a deceased testator, the lien created thereby is unaffected by the subsequent decree of distribution thereof. The attaching creditor of the devisee is not required to present his claim to the probate court, and is not entitled to participate in the distribution of the estate; but the property distributed continues to be subject to the lien.[10] An attachment is not dissolved by proceedings in bankruptcy begun by the defendant more than four months thereafter.[11]

§ 73. Expiration and Continuance of Lien.—An attachment being merely a creature of statute, its existence and operation in any case can continue no longer than the statutory period.[12] With respect to the duration and extension of attachment liens on real property generally, the code provides:

"The attachment . . . shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged as provided in this chapter, by dismissal of the action or by entry and docketing of judgment in the action. At the expiration of three years the lien shall cease and any proceeding or proceedings against the property under the attachment shall be barred; provided, that upon motion of a party to the action, made not less than five nor more than sixty days before the expiration of said period of three years, the court in which the action is pending may extend the

8. Halsey v. Martin, 22 Cal. 645 (decided under the Practice Act). See supra, § 71.

9. Kinder v. Macy, 7 Cal. 206 (decided under the Practice Act).

10. Martinovich v. Marsicano, 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333.

11. See infra, § 111.

12. Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758; Loveland v. Alvord etc. Mining Co., 76 Cal. 562, 18 Pac. 682. See infra, §§ 91–108, as to release of attachment; and §§ 109–120, as to dissolution of attachment.

time of said lien for a period not exceeding two years from the date on which the original lien would expire, and the lien shall be extended for the period specified in the order upon the filing, before the expiration of the existing lien, of a certified copy of the order with the recorder of the county in which the real property attached is situated. The lien may be extended from time to time in the manner herein prescribed."[13]

Under section 553 of the Code of Civil Procedure as amended in 1909 the lien continues pending an appeal from a judgment in favor of the defendant, providing the appeal has been perfected as required by the section and a proper undertaking executed.[14]

§ 74. Abandonment of Lien.—The law does not presume or favor abandonments, and before an attachment will be deemed to have been abandoned, there must be some affirmative act or conduct of the creditor inconsistent with the continuance of the lien. Moreover, the burden of proof is upon the one who alleges that there has been an abandonment. The filing of a new affidavit and undertaking and the procuring thereon of a new writ of attachment to correct an omission in the original affidavit accompanying the undertaking does not constitute an abandonment of the original or first attachment, so as to permit a chattel mortgage executed between the issuance of the two writs to become a first lien, where the attached property is held by the sheriff at all times under the first attachment.[15] Nor does the fact that a sheriff, having sufficiently levied upon growing crops, does nothing further until he harvests the crops constitute an abandonment of the attachment.[16]

13. Code Civ. Proc., § 542a.
14. See supra, § 67.
15. Bone v. Trafton, 31 Cal. App. 30, 159 Pac. 819.
16. Raventas v. Green, 57 Cal. 254. See CROPS.

§ 75. Merger of Lien in Judgment.—It is clear that the law does not contemplate the existence, at the same time, of two distinct liens, arising by operation of law in one action, for the security of one demand.[17] In consequence, when a judgment is rendered in an attachment suit, and becomes a lien on real property attached, the lien of the attachment is merged in the judgment.[18] But the judgment does not operate so as to release or obliterate the attachment lien. The property attached is still, in contemplation of law, in the hands of the officer, subject to the judgment; and the attachment lien still exists so as to confer a priority in the lien of the judgment.[19] Nor does the attachment lien so merge in the lien created by the judgment as to cause its extinction by the filing of a stay bond on appeal. The effect of the filing of such a bond is to extinguish only the liens resulting from the judgment and from process thereunder.[20] And an attachment lien is not lost by entry of simple money judgment without an express order of sale.[1] However, the merger is to the extent that if the lien of the judgment rendered in the action is allowed to expire by limitation, the attachment lien does not thereupon revive.[2] Both liens are wholly lost, under section 671 of the Code of Civil Procedure, by the lapse of five years after the date of the judgment. But the loss of such liens does not preclude the issuance of

17. Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256 (decided under the Practice Act).

18. Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Riley v. Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315; Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Scrivner v. Dietz, 68 Cal. 1, 8 Pac. 609; Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256 (decided under the Practice Act); Water Supply Co. v. Sarnow, 6 Cal. App. 586, 92 Pac. 667.

19. Hammond v. Starr, 79 Cal. 556, 21 Pac. 971; Porter v. Pico, 55 Cal. 174; Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256 (decided under the Practice Act).

20. Riley v. Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315. See APPEAL AND ERROR, § 224, vol. 2, pp. 374, 429, 431, 435.

1. Low v. Henry, 9 Cal. 538 (decided under the Practice Act).

2. Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256 (decided under the Practice Act).

execution after the lapse of five years upon a showing by affidavits.[3]

The rules discussed above in this section necessarily are confined in application, to real property, as the judgment does not constitute a lien upon personal property,[4] but it may be noted in this connection that the lien of an attaching creditor on stock assigned by his debtor to a third party is merged in the higher right created by a transfer of the stock on the books to the name of the third party when he purchases the judgment obtained by such creditors.[5]

Priorities.

§ 76. Between Attachments Generally.—As to ordinary attachments the rule, "qui prior est in tempore, potior est in jure," prevails.[6] In general, as between several attachments, the priority is determined by the time of the several levies, and this is particularly applicable when the writs are received and levied by different officers.[7] But it would seem that where several writs are placed in the hands of a sheriff, they are entitled to priority in the order in which they are received by him.[8] If the same property has been attached under two writs issued from different courts, and received by the sheriff and levied at different times, the court from which issued the writ last to be received and levied may order a sale of the attached property, but it cannot apply the proceeds of the sale to

3. Water Supply Co. v. Sarnow, 6 Cal. App. 586, 92 Pac. 667.

4. Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256 (decided under the Practice Act).

5. Strout v. Natoma Water and Mining Co., 9 Cal. 78 (decided under the Practice Act).

6. Strong v. Stapp, 74 Cal. 280, 15 Pac. 835 (holding that one formerly associated in partnership with a debtor has the same rights as any other creditor). The following cases, decided under the Practice Act, are to the same effect: Hunt v. Robinson, 11 Cal. 262; Dixey v. Pollock, 8 Cal. 570; Cahoon v. Levy, 6 Cal. 295, 65 Am. Dec. 515.

7. Whitney v. Butterfield, 13 Cal. 335, 73 Am. Dec. 584 (decided under the Practice Act).

8. Weaver v. Wood, 49 Cal. 297; 2 Ruling Case Law, p. 858, § 69.

the prejudice of the creditor claiming under the prior attachment.[9] And when a sheriff receives money on execution sale of property levied on by virtue of attachments, it is his duty to apply the money in the order of the attachments. He has no right to go back of the process and raise the question as to the validity of the attachments.[10] The attachment of partnership property forms an exception to the general rule, however, in some instances. It has been repeatedly held that the firm creditors are entitled to a preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens.[11] The same principle applies as between the creditors and several partnership firms composed of the same individuals.[12] And, where one partner buys out his copartners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, just as before the sale. The lien of firm creditors attaching, must be preferred to the lien of an individual creditor of the remaining partner, attaching first.[13]

§ 77. Effect of Insufficiency of First Attachment.—The rule as to priority between attachments is not applicable unless the first is sufficient to create a lien. Thus an attachment in the hands of an officer who is prevented from levying on personal property through his inability to gain access thereto is not prior to an attachment subsequently issued under which a levy is actually made.[14]

9. Weaver v. Wood, 49 Cal. 297.

10. McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115 (decided under the Practice Act).

11. Whelan v. Shain, 115 Cal. 326, 47 Pac. 57. The following cases were decided under the Practice Act: Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130; Burpee v. Bunn, 22 Cal. 194; Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605. See PARTNERSHIP.

12. Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130 (described under the Practice Act).

13. Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 675 (decided under the Practice Act).

14. See supra, § 70.

And an attachment which is prematurely levied is subject to attachments subsequently and properly levied.[15] Likewise the rule presupposes good faith on the part of the prior attaching creditor. A collusive attachment confers no right against a subsequent bona fide attachment,[16] and if an attachment has been issued on a debt not due, it is at least prima facie void as to a junior attaching creditor.[17] But where a debtor has fraudulently procured an extension on the claim of a creditor, due and owing, and subsequently gives him a demand note covering the amount of the claim, an attachment in an action on such note is valid against subsequent attaching creditors, the case not being one either of actual or constructive fraud.[18] When the first attachment is void by reason of fraud, an assignee without notice of the fraud will acquire no rights as against subsequent attaching creditors.[19] Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that, by his superior diligence, the fraud has been discovered.[20]

§ 78. Other Claims Generally.—Unquestionably, it is the general rule that a lien prior in point of time gives a prior claim which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it which shall postpone him in a court of law or equity to a subse-

15. Maier v. Freeman, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357 (in this case the first attachment was levied on the proceeds of a sale by a mortgagee prior to the completion of the sale); Early v. Redwood City, 57 Cal. 193.

16. Briody v. Conro, 42 Cal. 135 (decided under the Practice Act).

17. See supra, § 19.

18. Brewater v. Bours, 8 Cal. 501 (decided under the Practice Act).

19. Wright & Co. v. Levy, 12 Cal. 257 (decided under the Practice Act).

20. Patrick v. Montader, 13 Cal. 434 (decided under the Practice Act).

quent lien claimant.[1] A valid attachment lien takes priority over judgment liens attaching subsequently.[2] And it has been held that a confession of judgment to a bona fide creditor, and the issuance of execution, and making levy under the same by the judgment debtor, without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditor.[3] Likewise, a lien of attachment takes priority over a transfer of property which is not valid or sufficient under the statute of frauds.[4] Nor can the secret lien of the owner of property stand as against an attachment levied on a growing crop as the property of the tenant by the latter's creditor.[5] However, the holder of an attachment lien occupies no better position than a purchaser with notice.[6] His lien does not extend beyond the interest of the debtor in the property attached, and does not displace prior equities and rights.[7] So where a vendee has forfeited his rights under an executory contract for the sale of property, the vendor's rights are superior to those of a creditor of the vendee attaching the property before the forfeiture.[8]

In certain instances priorities between attachment liens and other claims upon attached property are governed by

1. Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609. See LIENS.

2. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Hunt v. Robinson, 11 Cal. 262 (holding that the replevy of attached property by a third party claimant does not terminate the lien of an attachment, but that the same retains its priority over executions levied upon the property subsequent to its return to the sheriff); Kewen v. Johnson, 11 Cal. 260 (the two cases last cited were decided under the Practice Act).

3. Ryan v. Daly, 6 Cal. 238.

4. Sexey v. Adkison, 40 Cal. 408 (decided under the Practice Act).

5. Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561.

6. O'Rourke v. O'Connor, 39 Cal. 442 (decided under the Practice Act).

7. See supra, § 71.

8. Kellogg v. Burr, 126 Cal. 38, 58 Pac. 306 (sale of personalty); Conde v. Sweeney, 16 Cal. App. 157, 116 Pac. 319 (sale of realty).

statute. Thus, under section 1206 of the Code of Civil Procedure, persons having claims of the kinds specified therein against a debtor whose property has been attached are entitled, under certain circumstances, to enjoy the fruits of the attachment and sale in preference to the attaching creditor.[9] Under section 1241 of the Civil Code, a debtor has a clear right to defeat his creditor's attachment on his real property, by impressing it with the character of a homestead at any time prior to a lien being fixed upon the premises by judgment obtained.[10]

The deposit in the recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties.[11]

§ 79. Deeds.—A writ of attachment is not an "instrument" within the sense of that term as used in section 1107 of the Civil Code.[12] A deed executed prior to the

9. Legg & Shaw Co. v. Worthington, 157 Cal. 488, 108 Pac. 284. See LIENS. Section 1206 of the Code of Civil Procedure provides as follows: "Upon the levy of any attachment or execution, not founded upon a claim for labor, any miner, mechanic, salesman, servant, clerk, laborer, or other person who has performed work or rendered services for the defendant within sixty days prior to the levy, may file a verified statement of his claim therefor with the officer executing the writ, and give copies thereof to the debtor and the creditor, and such claim, not exceeding one hundred dollars, unless disputed, must be paid by such officer from the proceeds of such levy remaining in his hands at the filing of such statement. . . . "

10. Wilson v. Madison, 58 Cal. 1; Sullivan v. Hendrickson, 54 Cal. 258; McCracken v. Harris, 54 Cal. 81; Lakas v. Archambault, 38 Cal. App. 365, 176 Pac. 180. See HOMESTEADS.

11. Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775 (construing the Practice Act).

12. Waid v. Waterman, 85 Cal. 488, 24 Pac. 930; Morrow v. Graves, 77 Cal. 218, 19 Pac. 489; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Hoag v. Howard, 55 Cal. 564; Wolfe v. Langford, 14 Cal. App. 359, 112 Pac. 203. Section 1107 of the Civil Code provides: "Every grant of an estate in real property is conclusive against the grantor, also against everyone subsequently claiming under him except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first recorded."

levy of an attachment upon the property conveyed, though not recorded, will prevail over the attachment,[13] even though the attaching creditor has had no notice of the transfer.[14] And the doctrine of relation will not operate to cure an attachment originally defective, due to the manner in which it was levied, so as to give it priority over an intervening conveyance made by the owner to a purchaser in good faith and for valuable consideration.[15]

A creditor who has merely levied an attachment upon real property as the property of his debtor, subsequent to the date of an alleged fraudulent conveyance made thereof by the debtor, cannot, prior to the rendition of a judgment against the debtor, maintain an action in equity to set aside the conveyance; the claim of the creditor should be certain before he can concern himself with the debtor's frauds, and it cannot be made certain except by judgment.[16] Nor can a judgment creditor who seeks to reach an equitable interest of the judgment debtor by virtue of an attachment levied subsequently to a trust agreement under which the property is held, object to a reformation of such trust agreement to conform to a prior agreement between the debtor and beneficiary on the ground that the agreement sought to be enforced was for the payment of a debt which was barred by the statute of limitations. The plea of the statute is a personal privilege of the debtor, which he may waive, by a new agreement for security, as against the judgment creditor who had no en-

13. Ward v. Waterman, 85 Cal. 488, 24 Pac. 930; Morrow v. Graves, 77 Cal. 218, 19 Pac. 489; Hoag v. Howard, 55 Cal. 564; Le Clert v. Oullahan, 52 Cal. 252; Plant v. Smythe, 45 Cal. 161 (holding that the Registry Act in force did not make an unrecorded deed void as against subsequent attaching creditors); Commercial National Bank v. Roberts, 33 Cal. App. Dec. 477, 194 Pac. 751; Wolfe v. Langford, 14 Cal. App. 359, 112 Pac. 203.

14. Plant v. Smythe, 45 Cal. 161.

15. Main v. Tappener, 43 Cal. 206 (decided under the Practice Act).

16. Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669. See CREDITORS' SUITS.

forceable right or lien at the date of the creation of the trust.[17]

§ 80. **Mortgages of Realty.**—An attaching creditor is not a bona fide purchaser within the meaning of section 1214 of the Civil Code, which provides, in effect, that an unrecorded mortgage of realty is void only as against subsequent purchasers or mortgagees, for value and in good faith. Accordingly, a creditor, by his attachment of property subject to a valid mortgage, whether recorded or not, takes only what interest the mortgagor has at the time of the levy.[18] However, the priority of the mortgagee extends only to such of his claims as are secured by the mortgage; his rights as to unsecured claims are subordinate to the rights of the attaching creditor to the extent of the levy.[19] A mortgage lien or interest acquired intermediate the levy of an attachment and the execution sale in the attachment suit is inferior to the lien of the attachment;[20] and as the title acquired through the sheriff's deed relates back to the levy of the attachment, the rights of the mortgagee under the mortgage are as effectually concluded thereby as are those of the mortgagor.[1] In an action to foreclose a mortgage, defendants claiming under an attachment lien accruing after the mortgage was given are entitled to prove the existence of their lien, and to show that, in consequence of certain acts of the plaintiff, set forth in their answer, it is superior to the lien of the mortgage.[2]

§ 81. **Chattel Mortgages.**—It seems that under the act of 1850,[3] the efficacy of a chattel mortgage as against at-

17. Ward v. Waterman, 85 Cal. 488, 24 Pac. 930. See LIMITATION OF ACTIONS.

18. Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590, 35 Pac. 170. See MORTGAGES.

19. Harvey v. Foster, 64 Cal. 296, 30 Pac. 849.

20. Reilly v. Wright, 117 Cal. 77, 49 Pac. 970.

1. Reilly v. Wright, 117 Cal. 77, 49 Pac. 970. See infra, § 83.

2. Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609.

3. Stats. 1850, p. 266.

taching creditors depended upon the delivery of the property to the mortgagee and a continued change of possession.[4] This statute, however, has been superseded by certain provisions of the code, among them, section 2957 of the Civil Code, which requires that a chattel mortgage, in order to be valid as against creditors, shall be accompanied by an affidavit showing the good faith of the parties, and shall be duly verified and recorded.[5] A mortgage of personalty which does not conform to the requirements of this section is void as against subsequent attaching creditors, whether the property is in the possession of the mortgagor,[6] or in the possession of the mortgagee with the consent of the mortgagor.[7] This is true regardless of the fact that the attaching creditors have actual notice and knowledge of the existence of the unrecorded chattel mortgage.[8] And a mortgage purporting to cover both

4. Ruggles v. Cannedy, 127 Cal. 290, 46 L. R. A. 371, 53 Pac. 911, 59 Pac. 827 (citing Hackett v. Manlove, 14 Cal. 85); Moore v. Murdock, 26 Cal. 514. See CHATTEL MORTGAGES.

5. Ruggles v. Cannedy, 127 Cal. 290, 46 L. R. A. 371, 53 Pac. 911, 59 Pac. 827.

6. Alferitz v. Scott, 130 Cal. 474, 62 Pac. 735 (holding that a verification subsequent to the recording, there being no record of the instrument so verified, is insufficient as against attaching creditors having no notice of the transaction other than that given by the record); Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169.

7. Loosemore v. Baker, 175 Cal. 420, 166 Pac. 26 (In this case the court said with reference to the judgment rendered in the lower court: "The judgment giving priority to the lien of the attachment under these facts comes strictly within the decisions of this court in Ruggles v. Cannedy, 127 Cal. 290, 46 L. R. A. 371, 53 Pac. 911, 59 Pac. 827, and Alferitz v. Scott, 130 Cal. 474, 62 Pac. 735. If it is thought that anything to the contrary in these decisions is held in Adlard v. Rogers, 105 Cal. 327, 38 Pac. 889, it must be considered as superseded by the later decision of the court in bank above cited," referring to Ruggles v. Cannedy. The decision in Adlard v. Rogers, 105 Cal. 327, 38 Pac. 889, is to the effect that a chattel mortgage which is defective in not being acknowledged or proved and certified, as provided in section 2957 of the Civil Code, is void as against an attaching creditor of the mortgagors, unless the mortgagee has reduced the property to possession prior to the attachment).

8. Cardenas v. Miller, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472.

real and personal property, but which is executed only as a mortgage of real property, and not in accordance with the requirements of the Civil Code with reference to mortgages of personal property, is void as to the personal property as against the attaching creditors of the mortgagor.[9]

Effect of recording chattel mortgage.—The priority of valid recorded chattel mortgages over subsequent attachments is well recognized, and personal property subject to such a mortgage can only be taken under attachment by a creditor of the mortgagor after a compliance with sections 2968 and 2969 of the Civil Code.[10] These sections do not apply, however, when personal property which is not such as may be mortgaged under section 2955 of the Civil Code has been mortgaged, if the debt sued upon by the attaching creditor was created prior to the execution of the

9. Bishop v. McKillican, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76. But see Quiriaque v. Dennis, 24 Cal. 154 (decided under the act of 1857, relating to chattel mortgages, holding that a mortgage upon growing crops, executed, acknowledged and recorded like mortgages of real estate, was valid as against creditors attaching subsequent to such execution). See CHATTEL MORTGAGES and MORTGAGES as to statutory requirements for execution of mortgages.

10. Sousa v. Lucas, 156 Cal. 460, 105 Pac. 413; Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619; Irwin v. McDowell, 91 Cal. 119, 27 Pac. 601; Berson v. Nunan, 63 Cal. 550; Wood v. Franks, 56 Cal. 217; Carstenbrook v. Wedderein, 7 Cal. App. 465, 94 Pac. 372 (holding where creditors of the mortgagor attached property secured by chattel mortgage, and were compelled to pay the mortgage debt, and the mortgagee thereupon released and canceled the mortgage, that they were not entitled to an equitable subrogation to cancel the release and foreclose the mortgage, no equitable facts appearing in the record to warrant it. In such a case, the remedy for reimbursement of the money so paid, out of the proceeds of a sale upon execution, under section 2970 of the Civil Code, is an exclusive remedy.

Section 2968 of the Civil Code provides as follows: "Personal property mortgaged may be taken under attachment or execution levied at the suit of a creditor of the mortgagor"; and section 2969 provides: "Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee."

mortgage, or subsequent thereto and without actual notice on the part of the creditor of the existence of the mortgage,[11] unless the mortgagee has taken possession of the mortgaged property.[12] But this does not mean that when the mortgage includes property which can be lawfully mortgaged as well as that which cannot, a creditor can levy an attachment upon the property lawfully mortgaged without a compliance with sections 2968 and 2969 of the Civil Code.[13]

Mortgagee's loss of priority by subsequent disposition of property.—Even though a chattel mortgage be validly executed, the rights of the mortgagee may, due to the subsequent disposition of the property, become subordinate to those of a subsequent attaching creditor.[14] Thus, under section 2972 of the Civil Code, which provides that the lien of a mortgage on a growing crop continues "as long as the same remains on the land of the mortgagor," a mortgage lien on a crop is prima facie extinguished when the crop is removed from the land of the mortgagor, and the rights of a creditor attaching subsequent to such removal will, in absence of fraud, prevail over those of the mortgagee.[15] Similarly, where the mortgagees of property under a chattel mortgage authorize the mortgagor to make sale of the property, the lien upon the property is lost and extinguished by the sale, and is not transferred

11. Old Settlers Investment Co. v. White, 158 Cal. 236, 110 Pac. 922 (construing sections 2957 and 2973 of the Civil Code).

12. Glenn v. Arnold, 56 Cal. 631.

13. Old Settlers Investment Co. v. White, 158 Cal. 236, 110 Pac. 922.

14. Maier v. Freeman, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; Horgan v. Zanetta, 107 Cal. 27, 40 Pac. 22.

15. Horgan v. Zanetta, 107 Cal. 27, 40 Pac. 22 (holding that the fact. that the attaching creditor had, in ignorance of the mortgage, procured the crop to be removed from the land of the mortgagor to his own land did not prevent him from levying upon it, though at the time of the levy he knew there had been a mortgage). But see Rider v. Edgar, 54 Cal. 127, to the effect that a chattel mortgage upon a growing crop, as against an attaching creditor, continues to be a lien upon the crop, in the possession of the mortgagor, after severance and removal from the land.

to the proceeds in the hands of the mortgagor, but such proceeds are the property of the mortgagor until collected and paid over to the mortgagees, and may be attached by creditors of the mortgagor.[16] And an attachment lien is entitled to superiority over the equitable right of a mortgagee to property substituted by the mortgagor with the mortgagee's consent for property originally subject to the mortgage, when the attachment was levied before the mortgagee took possession of such substituted property.[17]

Effect of removal of property from county.—Where personal property subject to a chattel mortgage has been removed by the mortgagor from the county where the mortgage was executed, and where the property was situated and the mortgagor resided at the time of the execution of the mortgage, and before it has been recorded in such county, it must be recorded in the county to which the property has been removed by the mortgagor, unless the mortgagee has taken possession as provided in section 2966 of the Civil Code. Otherwise, by force of section 2959 of the Civil Code, it is void as to creditors and subsequent purchasers and encumbrancers in good faith. And a subsequent recordation by the mortgagee in the county where the property was originally situated, made after its removal and before the attachment, cannot avail as against the attaching creditor.[18]

§ 82. Rights of Bailees and Pledgees.—A debtor cannot, by placing or allowing his property to be in the possession of a third party, screen it from attachment. However lawful the possession of the bailee, the property is still subject to attachment at the suit of a creditor of the owner. Such rights as the bailee may have to the use or possession of the property, and such liens as he may have

16. Maier v. Freeman, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357.

17. Alferitz v. Perkins, 122 Cal. 391, 55 Pac. 149.

18. Fassett v. Wise, 115 Cal. 316, 36 L. R. A. 505, 47 Pac. 47, 1095.

upon it, will of course be protected, but, saving the rights of the bailee, the creditor may take it. The question, therefore, when property in the possession of a bailee is attached, is not as to the lawfulness of the bailee's possession, or his right to recover the property from a mere trespasser; it is a question as to which right is superior,—his or the attaching creditor's. This rule has been applied where property in the lawful custody of a foreign receiver and brought into the state by him in the course of business was attached by a domestic creditor.[19]

A pledgee's lien upon pledged property in his possession is superior to any rights a creditor of the pledgor may acquire by an attachment of such property. But a pledgee, by voluntarily parting with the pledge, loses his lien thereon, and any right he may have in the property may be defeated by an attachment levied by a creditor of the pledgor.[20] After notice of the assignment of a debt is given to the debtor and to a pledgee of the debtor, the assignee cannot be estopped or compromised by any subsequent act of the assignor in consenting to the possession of the pledged property by the debtor, so as to bar an attachment of the property in his hands by the assignee of the debt. Moreover, the fact that the indebtedness assigned was not evidenced by a negotiable instrument is immaterial to the rights of the assignee as against the pledgor under such attachment.[1] It has been held in order to render a pledge of partnership property as security for the claims of creditors effective against seizure under an attachment by another creditor of the firm, the delivery to the trustees for the creditors must be as complete, and the actual change of possession as continuous

19. Humphreys v. Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76, 6 L. R. A. 792, 22 Pac. 892. See infra, § 84. And see BAILMENT.

20. Salinas City Bank v. Graves, 79 Cal. 192, 21 Pac. 732, 734; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770 (decided under the Practice Act). See PLEDGE.

1. Salinas City Bank v. Graves, 79 Cal. 192, 21 Pac. 732, 734. See infra, § 86, as to pledges of corporate stock.

and open, as is required in case of sales of personal property, by section 3440 of the Civil Code.[2]

§ 83. **Rights of Assignees.**—A mere assignment in trust by a debtor cannot interfere with rights of attaching creditors who do not choose to be bound thereby. And an attachment lies to reach funds placed in hands of a third party for the benefit of creditors where there is no evidence of an indebtedness on the part of the assignor.[3] But as against a valid assignment for the benefit of creditors, a subsequent attaching creditor cannot claim any priority. The right acquired by the latter in such a case is precisely that which the debtor has at the time of the levy. This is the right to the overplus remaining after the claims of those benefiting by the assignment are satisfied.[4] The presumption is in favor of the validity of an assignment, and fraud must be clearly proved by a sheriff who, claiming possession by virtue of a writ of attachment, attacks an assignment of personal property as being for the purpose of defrauding the creditors of the assignee and preventing the collection of their just obligations.[5]

Assignee in insolvency or bankruptcy.—A levy upon property by virtue of an attachment creates an interest in the property superior to the rights of a subsequently appointed assignee in insolvency, and only an express statutory provision to that effect will make the proceedings in insolvency paramount to such lien. Under section 21 of the Insolvent Act of 1895 an assignee in insolvency will have preference as to property attached "within one month next preceding the commencement of the insolvency

2. Lilienthal v. Ballou, 125 Cal. 183, 57 Pac. 897.

3. Chandler v. Booth, 11 Cal. 342 (decided under the Practice Act).

4. Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449 (decided under the Practice Act). See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

5. Roberts v. Burr, 135 Cal. 156, 67 Pac. 46. See ASSIGNMENTS, § 31, as to priorities between assignee and garnisheeing creditor; and see GARNISHMENT.

proceeding";[6] while the provisions of the federal Bankruptcy Act of 1898 render void any attachment levied upon the property of the bankrupt debtor within four months prior to the institution of proceedings in bankruptcy.[7]

§ 84. Rights of Receivers.—The levy of attachment upon real property does not so bring the property within the custody of the court as to render unlawful its seizure by the receiver of another court of the state or of a federal court.[8] But the subsequent possession of receivers appointed by the court cannot affect an existing lien of attachment. On the contrary, in the administration of the property, this lien will be recognized and protected, according to its priority,[9] and the claimant of the lien can only be made to share with unsecured creditors in a pro rata distribution of assets, as to the amount of any unsecured deficiency.[10]

It is generally held that attaching creditors can acquire no lien on property which is in the hands of a receiver duly appointed by a competent court.[11] However, there is some authority to the contrary.[12] The rule that a chattel mortgage which is not duly verified and recorded as required by section 2957 of the Civil Code is void as against subsequent attaching creditors applies to chattel

6. Hefner v. Herron, 117 Cal. 473, 49 Pac. 586. See INSOLVENCY.

7. See infra, §§ 110, 111.

8. In re Hall & Stilson Co., 73 Fed. 527 (construing Code Civ. Proc., § 542, subd. 1).

9. Bories v. Union Building etc. Assn., 141 Cal. 74, 74 Pac. 552 (holding that an injunction suit by the attorney general against a building and loan association to restrain its business did not affect the lien of an attachment levied prior to the commencement of such suit); Von Roun v. Superior Court, 58 Cal. 358; In re Hall & Stilson Co., 73 Fed. 527.

10. Bories v. Union Building etc. Assn., 141 Cal. 74, 74 Pac. 552. See RECEIVERS.

11. County of Yuba v. Adams & Co., 7 Cal. 35 (decided under the Practice Act); Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491 (decided under the Practice Act).

12. Adams v. Woods & Haskell, 9 Cal. 24 (upholding an attachment of partnership funds in the hands of a receiver pending a dissolution of the firm).

mortgages generally, and there is no exception in the case of a mortgage held by the receiver of a corporation.[13]

Foreign receivers.—It is the settled law of California that, as between the receiver of an insolvent foreign corporation, appointed under the laws of another state not in force here, and a domestic attaching creditor, both claiming a fund situated in this state, the fund will be decreed to the domestic creditor, without stopping to inquire into the legality of the appointment of the receiver or as to his rights under the laws of his state.[14] Under the laws of the state the domestic creditor has the right to attach the property, and no rule of state comity or of law requires that this right be set aside in deference to a foreign receiver claiming under the laws of another state;[15] nor will the plea that the receiver also represents domestic creditors avail, they not being parties to the action, and his appointment being presumably without their assent.[16] Likewise property of a railway company in the lawful custody of a foreign receiver, if brought into California by him in the course of business, is subject to attachment by a creditor of the company, resident in this state, and justice to the domestic creditor demands that the principle of comity shall not be so extended as to sustain a suit by the receiver to replevy the property.[17]

§ 85. Rights of Buyer and Seller of Personalty.—As a general rule, an absolute sale of personal property operates to divest the seller of all his interest therein, and consequently such property cannot be attached thereafter in

13. Bishop v. McKillican, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76. See supra, § 81.

14. Lackmann v. Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583.

15. Lackmann v. Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583; Ward v. Pacific Mutual etc. Ins. Co., 135 Cal. 235, 67 Pac. 124; Humphreys v. Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76, 6 L. R. A. 792, 22 Pac. 892.

16. Lackmann v. Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583.

17. Humphreys v. Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76, 6 L. R. A. 792, 22 Pac. 892. See RECEIVERS.

an action against him. But where a statute declares a previous transfer of title void as to creditors of the transferrer, there is an exception to this rule.[18] Examples of this are found in the case of transfers tainted with actual fraud which are expressly declared by section 3439 of the Civil Code to be void as to creditors of the person making the transfer; and where transfers of personal property of the kinds specified by section 3440 of the Civil Code, though made in good faith, are not followed by immediate delivery and actual and continued change of possession;[19] the latter are conclusively presumed to be fraudulent,[20] and notice to the creditor, in event of a levy, that a third person holds the title, whether given before or after the levy, does not affect the attachment.[1] But a sale of personal property, though not followed by an immediate delivery and actual and continued change of possession, as required by section 3440 of the Civil Code, is good against the creditors of the vendor, except when attacked in legal proceedings for the collection of their debts; and the vendee, being the owner, can convey title thereto, and the purchaser will acquire a title good against the attaching creditors of the original vendor.[2] And an attaching creditor is estopped to deny the validity of a sale, under that section, when with a full knowledge of the facts he has acquiesced in and consented to the sale.[3]

18. National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; Thornburgh v. Hand, 7 Cal. 554 (decided under the Practice Act). See SALES.

19. National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

20. National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; Hammond v. Borgwardt, 126 Cal. 611, 59 Pac. 121 (sale by husband to wife); Weil v. Paul, 22 Cal. 492 (decided under the Fraudulent Conveyance and Contract Act of 1850, Stats. 1850, p. 266).

1. National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

2. Williams v. Borgwardt, 119 Cal. 80, 51 Pac. 15.

3. Sullivan v. Johnson, 127 Cal. 230, 59 Pac. 583.

The effectiveness of a delivery of personal property as against attaching creditors depends upon the character of the property,[4] but, in general, the change of possession must be actual, visible and apparent, and such as to give the public evidence of the claim of the new owner.[5]

The validity of conditional contracts of sale of personal property whereby possession is delivered to the buyer while the title remains in the seller is well recognized, and creditors of the buyer cannot, by attachment, acquire rights superior to those of the seller.[6] When the property remains in the possession of seller, under a conditional sale agreement, there can, of course, be no question of the priority of his rights over those of attaching creditors of the buyer.[7]

The right of stoppage in transitu is paramount to any lien on the goods claimed by third persons through the purchaser, and may be exercised to defeat an attachment levied upon the goods by a creditor of the vendee. The lien acquired by the levy operates only upon the interest of the debtor, and cannot defeat the paramount right of a stranger.[8] Prior to the notification of a carrier by the transferrer or transferee of a non-negotiable bill of lading that a transfer has been made, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by attachment.[9]

§ 86. Unregistered Transfer of Corporate Stock.—Section 324 of the Civil Code, providing that an unregistered

4. Adlard v. Rodgers, 105 Cal. 327, 38 Pac. 889; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135 (decided under the Practice Act). See SALES; FRAUDULENT CONVEYANCES.

5. Ross v. Thomas, 24 Cal. App. 734, 142 Pac. 102. See FRAUDULENT CONVEYANCES.

6. Ross v. Thomas, 24 Cal. App. 734, 142 Pac. 102; Morris v. Allen, 17 Cal. App. 684, 121 Pac. 690. See SALES.

7. Johnson v. White, 46 Cal. 328 (in this case the buyer negotiated the sale by which the seller acquired title).

8. Blackman v. Pierce, 23 Cal. 508 (decided under the Practice Act).

9. Civ. Code, § 2129e.

transfer of stock "is not valid except as to the parties thereto," is judicially construed as merely imputing its invalidity as against subsequent purchasers without notice, and its validity in all other respects, so that the general rule prevails that an unregistered transfer is valid as against a mere levy of attachment by a creditor against the person in whose name it may remain upon the books.[10] And a purchaser for value of stock in a railway company from its debtor, which was not transferred on its books at the time of an attachment thereof by the company for the debt, may, pending the attachment suit, maintain an action against the company to compel a transfer of such stock upon its books, and the issuance of a certificate of stock to him, free from the lien of the attachment.[11] But a purchaser at the execution sale under the judgment of the attaching creditor, without notice of the previous unregistered transfer, takes the stock discharged of the transferee's rights.[12] The language in a certificate of stock reciting that it is transferable only on the books of the company and on surrender of the certificate merely gives notice of the rights of the corporation as to transfers, but does not affect the transfer, nor change the relative rights of the parties nor make the unregistered transfer subject to the attachment lien.[13]

As between the parties, a pledge of shares of corporate stock may be effected by indorsement and transfer of the stock certificates, but the transfer, to avail against the

10. National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600; Weston v. Bear River etc. Co., 6 Cal. 425, reversing 5 Cal. 186, 63 Am. Dec. 117 (decided under the Statute of 1850, section 12 of which is identified with the present section 324 of the Civil Code). See for general treatment of unrecorded stock transfers, CORPORATIONS.

11. National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

12. Farmers' Nat. Bank v. Wilson, 58 Cal. 600.

13. National Bank etc. v. Western Pac. Ry. Co., 157 Cal. 573, 21 Ann. Cas. 1391, 27 L. R. A. (N. S.) 987, 108 Pac. 676.

creditors of the pledgor, must be accompanied by delivery and continued change of possession; and if the possession of the certificates by the pledgee is only momentary, and they are at once returned to the pledgor, no valid pledge is constituted as against the creditors of the pledgor, and they may be attached and sold under execution against him.[14]

§ 87. Determination of Priority.—An attachment lien may be attacked with a view to having it declared subordinate to other claims upon the attached property either by proceedings in intervention in the attachment suit,[15] or by separate and distinct proceedings, and the right to attack it is not impaired by a judgment being recovered by the attaching creditor.[16] Such attacks must be made on grounds rendering the attachment void, such as a want of merit in the claim of the prior attaching creditor, or of collusion between him and the debtor.[17] A junior attaching creditor cannot take advantage of irregularities or informalities in the proceedings in a prior attachment, though constituting good grounds to set aside the attachment on the motion of the defendant. The formality and regularity of such proceedings, in the absence of fraud and collusion between the plaintiff and defendant, are matters pertaining exclusively to the defendant. If he is content, no one else can complain on such grounds.[18] And a complaint in an action to subordinate a prior

14. McFall v. Buckeye etc. Assn., 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253. See PLEDGE.

15. See infra, §§ 121–123.

16. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

17. Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542 (holding that a creditor's knowledge of the insolvency of the debtor will not prevent the levy of an attachment or render it invalid as against subsequent claims); Levy v. Irvine, 134 Cal. 664, 66 Pac. 953; Fridenberg v. Pierson, 18 Cal. 152, 79 Am. Dec. 162 (decided under the Practice Act).

18. Shea v. Johnson, 101 Cal. 455, 35 Pac. 1023; Fridenberg v. Pierson, 18 Cal. 152, 79 Am. Dec. 162 (decided under the Practice Act). See supra, §§ 23, 24.

attachment lien of the defendant to a subsequent attachment lien of the plaintiff's, which merely attacks the sufficiency of the attachment affidavit, and not the justness or validity of the debt of the defendant, fails to state a cause of action.[19] The application of an attaching creditor, to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given, by the party moving, to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them.[20]

It is not necessary for the court, in order to enforce priority of lien, to make an order for the sale of the property attached or to issue a venditioni exponas. The execution upon the judgment is a sufficient authority to the sheriff to sell the real property which he has in his possession,[1] and the deed which he makes relates back to the date of the lien perpetuated by the judgment.[2] If this were not so, a subsequent attachment lien would give an attaching creditor a lien superior to the title of a purchaser in an action under a judgment which perpetuates a prior attachment lien.[3]

IX. PREVENTION OF ATTACHMENT.

§ 88. In General.—The levy of an attachment may be prevented by the defendant in the action in which the writ has issued by his giving to the sheriff charged with the service of the writ security by an undertaking of at

19. Shea v. Johnson, 101 Cal. 455, 35 Pac. 1023.

20. Dixey v. Pollock, 8 Cal. 570 (decided under the Practice Act).

1. Porter v. Pico, 55 Cal. 165.

2. Martinovich v. Marsicano, 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2; Reilly v. Wright, 117 Cal. 77, 49 Pac. 970; Godfrey v. Monroe, 101 Cal. 224, 35 Pac. 761; Riley v. Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315; Porter v. Pico, 55 Cal. 165; Sharp v. Baird, 43 Cal. 577 (decided under the Practice Act).

3. Porter v. Pico, 55 Cal. 165.

least two sufficient sureties in an amount sufficient to satisfy the demand of the plaintiff, besides costs, or in an amount equal to the value of the property which is about to be attached.[4] This is true, generally speaking, when the attachment has issued from a justice's court.[5] In the event that the action is against more than one defendant, any defendant may prevent the attachment of his property by the delivery of such an undertaking accompanied by an affidavit declaring that the other defendants have no interest or claim in or to such property, and setting out the nature of the defendant's title.[6]

The undertaking is to be taken instead of the property, and is not for the protection of the sheriff, but for the benefit of the parties to the action—as to the defendant, to protect his property from attachment; and as to the plaintiff, as security for the payment of the judgment that may finally be rendered in the case.[7] The act of the officer in refraining from enforcing the writ, or attempting to make a levy, is a sufficient consideration for the giving of the bond, and to support the contract of the sureties thereon.[8] When the required security has been given, the property of the defendant cannot be attached,[9] and it has been held, it is immaterial that its value has been lessened by the subsequent insolvency of one of the sure-

4. Code Civ. Proc., §§ 537, 540; Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156; Ayres v. Burr, 132 Cal. 125, 64 Pac. 120 (holding that bond to prevent levy of attachment is not affected by giving of a bond to stay the enforcement of judgment in action upon an appeal therefrom; Curiac v. Packard, 29 Cal. 194 (decided under similar provisions of the Practice Act); Bailey v. Aetna Indem. Co., 5 Cal. App. 740, 91 Pac. 416.

5. Code Civ. Proc., § 868.

6. Code Civ. Proc., § 540, as amended May 26, 1917, Stats. 1917, p. 938; Code Civ. Proc., § 868, as amended May 26, 1917, Stats. 1917, p. 939 (applying particularly to actions in justices' courts).

7. Ayres v. Burr, 132 Cal. 125, 64 Pac. 120; Curiac v. Packard, 29 Cal. 194 (decided under the Practice Act).

8. Fresno Home Packing Co. v. Hannon, 16 Cal. App. 284, 116 Pac. 687.

9. Ayres v. Burr, 132 Cal. 135, 64 Pac. 120; Thayer v. Braden, 27 Cal. App. 435, 150 Pac. 653.

ties.[10] However, the requirement is that such bond be given by the one whose property is about to be attached, the demand being that "such defendant" give the security. So where it appears that an undertaking furnished by one member of a partnership was not given for or to prevent the attachment of the property of his copartner, it is not sufficient to warrant the sheriff in withholding the attachment.[11]

§ 89. Liability of Sureties on Undertaking.—The liability of the sureties on an undertaking given to prevent an attachment is measured by their contract, and in the main their discharge is governed by the rules applicable to the discharge of any surety upon an obligation.[12] Forbearance will not discharge them; nor will a direction to the sheriff to return an execution without levy; and their liability is not affected by judgment being entered by consent and execution stayed by stipulation of the parties to the action. So, also, the mere fact that the sheriff has levied upon property prior to the execution of an undertaking to prevent an attachment and subsequently released it will not release the obligors from liability on the bond.[13]

When the undertaking has been executed pursuant to section 540 of the Code of Civil Procedure, a return of execution unsatisfied, in whole or in part, against the debtor is essential to fix the liability of the sureties thereon.[14]

§ 90. Pleading in Action on Undertaking.—In general, the same rules of pleading apply to actions upon under-

10. Ayres v. Burr, 132 Cal. 125, 64 Pac. 120.

11. Thayer v. Braden, 27 Cal. App. 435, 150 Pac. 653.

12. Preston v. Hood, 64 Cal. 405, 1 Pac. 487 (decision of department in same case, 2 Cal. Unrep. 148, not sustained). See SURETYSHIP.

13. Preston v. Hood, 64 Cal. 405, 1 Pac. 487 (decision of department in same case, 2 Cal. Unrep. 148, not sustained).

14. Code Civ. Proc., § 552; Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120.

takings given to prevent the levy of an attachment as to actions on those given for the release of property which has been attached.[15] The plaintiff must, in express terms, allege the consideration for which the undertaking was executed; a mere reference to the condition of the bond is insufficient.[16] It has been held, however, that when, in such a case, the complaint states that the undertaking was given to release an attachment, whereas the undertaking itself recites that it was given to prevent a levy, the variance is not material.[17] Nor is the complaint defective for alleging that the undertaking was given to prevent an attachment, and that upon its delivery the sheriff released the property attached.[18] It is not necessary that the complaint should aver that the defendant in the attachment suit had property within the county which was subject to be levied upon under the writ of attachment.[19]

X. Release of Attachment.

§ 91. How Effected in General.—Under the present statute the release of attached property may be effected in several different ways. The most expeditious modes are those permitted by section 560 of the Code of Civil Procedure, which was enacted in 1907 and provides as follows:

"An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property; and upon the filing of such release, it is the duty of the recorder to note the same on the record of the copy of the writ on file in his office. Such attachment may also be re-

15. See infra, § 105.

16. Coburn v. Pearson, 57 Cal. 306.

17. McNamara v. Hammerslag, 2 Cal. Unrep. 259, 2 Pac. 391.

18. Preston v. Hood, 64 Cal. 405, 1 Pac. 487 (decision of department in same case, 2 Cal. Unrep. 148, not sustained).

19. Fresno Home Packing Co. v. Hannon, 16 Cal. App. 284, 116 Pac. 687.

leased by an entry in the margin of the record thereof, in the county recorder's office, in the manner provided for the discharge of mortgages under section twenty-nine hundred and thirty-eight of the Civil Code."

The evident purpose of this section is to permit the release of an attachment at any time during the proceedings and without an order of the court. Even prior to the enactment of this section, it was held that there was nothing in the code to indicate an intention to preclude an attaching creditor from voluntarily releasing property attached, or that such a release would not be valid until it received the sanction of the court.[20] It would seem, however, that under a proper construction of the statute as a whole, the sheriff, in his official character, has no authority to release property from attachment except while the writ remains in his possession and upon receiving the undertaking provided for in section 540 of the Code of Civil Procedure; and that if the debtor, after the return of the writ, desires a release of the property, he cannot lawfully obtain it from the sheriff, but must apply to the creditor, or enter his appearance in the action, and apply to the court for an order of release, as provided in sections 554 and 555 of the Code of Civil Procedure.[1]

§ 92. **Release on Security.**—There are two methods prescribed by the Code of Civil Procedure for releasing property from attachment by giving an undertaking.[2] Under section 540 of the Code of Civil Procedure the release may be made by the sheriff at any time prior to the return of the writ upon his receipt from the defendant of an under-

20. Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156; Smith v. Robison, 64 Cal. 387, 1 Pac. 353.

1. Maskey v. Lackman, 146 Cal. 777, 81 Pac. 115; Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156; San Francisco Sulphur Co. v. Aetna Indem. Co., 77 Cal. App. 695, 106 Pac. 111.

2. Preston v. Hood, 64 Cal. 405, 1 Pac. 487 (decision of department in same case, 2 Cal. Unrep. 148, not sustained); San Francisco Sulphur Co. v. Aetna Indem. Co., 11 Cal. App. 695, 106 Pac. 111; affirmed 11 Cal. App. 701, 106 Pac. 113.

taking of at least two sufficient sureties in an amount sufficient to satisfy the creditor's demand, besides costs, or in an amount equal to the value of the property which has been attached,[3] provided

"That before said attachment shall be released, the undertaking required by this section must be approved by the judge of the court issuing same or if said writ of attachment is from another county, then by a judge of a court of similar jurisdiction in the county where the levy shall have been made."

And if the action is against more than one defendant, a release of property may be obtained in this manner by any defendant, providing the undertaking is accompanied by an affidavit declaring that the other defendant or defendants in the action have no interest or claim in or to such property, and stating the nature of the title of the defendant procuring the release.[4] The foregoing rules apply in general to the release of attachments levied under writs issuing from justices' courts.[5]

After the return of the court, however, such a release must be made by the court as provided by sections 554 and 555 of the Code of Civil Procedure,[6] upon the execu-

3. Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 Pac. 1124; Maskey v. Lackmann, 146 Cal. 777, 81 Pac. 115; Ayres v. Burr, 132 Cal. 125, 64 Pac. 120; Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156; Curtin v. Harvey, 120 Cal. 620, 52 Pac. 1077; Preston v. Hood, 64 Cal. 405, 1 Pac. 487 (decision of department in same case, 2 Cal. Unrep. 148, not sustained); San Francisco Sulphur Co. v. Aetna Indem. Co., 11 Cal. App. 695, 106 Pac. 111; ~~affirmed 11 Cal. App. 701, 106 Pac. 113;~~ Kanouse v. Brand, 11 Cal. App. 699, 106 Pac. 120.

(See "Errata", Supp. Vs. 1-13, p. 135)

4. Code Civ. Proc., § 540, as amended May 26, 1917, Stats. 1917, p. 938.

5. Code Civ. Proc., § 868, as amended May 26, 1917; Stats. 1917, p. 939.

6. Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156; Preston v. Hood, 64 Cal. 405, 1 Pac. 487 (decision of department in same case, 2 Cal. Unrep. 148, not sustained); San Francisco Sulphur Co. v. Aetna Indem. Co., 11 Cal. App. 695, 106 Pac. 111; affirmed 11 Cal. App. 701, 106 Pac. 113; Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120.

tion by the defendant of a delivery or forthcoming bond.[7] Section 554 is to the effect that

"Whenever any defendant has appeared in the action, such defendant may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section an order may be made, releasing from the operation of the attachment any or all of the property attached. . . . "[8]

And section 555 provides that

"Before making such order, the court or judge must require an undertaking on behalf of such defendant, by at least two sureties, residents and freeholders, or householders in the state to the effect that in case the plaintiff recovers judgment in the action against the defendant by whom, or in whose behalf such undertaking shall be given, such defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of any judgment in such action against said defendant, or in default thereof, that such defendant and sureties will, on demand, pay to the plaintiff the full value of the property released not exceeding the amount of such judgment against such defendant. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose."[9]

Justification of sureties.—An attachment plaintiff has five days, after notice of the filing of an undertaking, under sections 554 and 555 of the Code of Civil Procedure, for the release of an attachment, within which to require justification of the sureties; and until the lapse of this

7. Turner v. Fidelity & Deposit Co., 33 Cal. App. Dec. 428, 194 Pac. 58.

8. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 21, 53 Pac. 444, not sustained; Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758.

9. Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758.

time without justification being required the attaching officer is bound to keep the property for the benefit of the attachment plaintiff, and he is not guilty of conversion for failure to comply with a prior demand by the attachment defendants for the return of the property.[10]

§ 93. Form of Undertaking.—A bond taken by a sheriff, in consideration of the release of an attachment, is not void for want of conformity to the requirements of section 540 of the Code of Civil Procedure, which, while prescribing one kind of form, does not prohibit another.[11] A common-law bond, in form, upon the prescribed statutory conditions, is a sufficient compliance with the provisions of the statute,[12] and cannot be repudiated in an action by those who asked for and received its benefits, even if its conditions are more onerous than those of the statutory undertaking.[13] If the bond substantially conforms to the requirements of section 540 of the Code of Civil Procedure, and the fair presumption aided by the circumstances in which the parties are placed is that it was executed with reference to that section, it must be regarded as a statutory undertaking.[14] No order of the court is essential to its effectiveness as a statutory or common-law bond, whatever its form, when voluntarily given to the sheriff before the return of the writ for the purpose of procuring the release of an attachment levied upon defendant's effects.[15] If given after the return of

10. Doe v. Cramer, 179 Cal. 722, 178 Pac. 850.

11. Smith v. Fargo, 57 Cal. 157; Palmer v. Vance, 13 Cal. 553 (decided under a similar provision of the Practice Act); Turner v. Fidelity & Deposit Co., 33 Cal. App. Dec. 428, 194 Pac. 58.

12. Curiac v. Packard, 29 Cal. 194 (decided under a similar provision of the Practice Act); Bailey v. Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.

13. Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072. As to common law and statutory bonds generally, See BONDS.

14. Kast v. Pacific Surety Co., 32 Cal. App. Dec. 598; Passow & Son v. United States Fidelity & Guaranty Co., 177 Cal. 31, 170 Pac. 1124; Heynemann v. Eder, 17 Cal. 433 (decided under a similar provision of the Practice Act)).

15. Bailey v. Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.

the writ, it becomes effective regardless of its form, when the order of the court discharging the attachment is obtained.[16] Where attached property is released by a sheriff in the usual way, on the giving of an undertaking in the form required by section 540 of the Code of Civil Procedure, the character of the undertaking, as a statutory undertaking, is not changed by the fact that it is passed directly to the plaintiff instead of being delivered to the sheriff.[17]

§ 94. Effect of Delivery of Undertaking.—Under the Practice Act it was held that the giving of a bond to procure the release of attached property operated only to release the property from the custody of the sheriff, pending the suit, and was not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his judgment. This, it was declared, was apparent from the language of section 134 of that act, which read precisely as the present section 552 of the Code of Civil Procedure does, that "if execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given" pursuant to the statute.[18] However, the decisions rendered since the enactment of the present code would seem to support the contrary view. Thus, it has been held that the giving of an undertaking for the release of attached property not only dissolves the attachment,[19] but that, inasmuch as under the theory of the remedy of attachment as administered in the state the property attached does not become a res, no lien of the attachment can persist on the property after the release to the owner; that it is impossible that property can be released from

16. Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072.

17. Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 Pac. 1124.

18. Low v. Adams, 6 Cal. 277.

19. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 240, 53 Pac. 441 not sustained); Risdon Iron etc. v. Citizens' Traction Co., 122 Cal. 94, 68 Am. St. Rep. 25, 54 Pac. 529; Smith v. Supreme Lodge A. O. U. W., 12 Cal. App. 189, 106 Pac. 1102.

the operation of the attachment if it yet remains subject to the attachment lien.[20] And this latter view is supported by the fact that a debtor who has obtained a release of property under a statutory undertaking may, by mortgaging it, create a lien which will be superior to the execution in the attachment suit,[1] or, by selling it, put it out of his power to make a redelivery.[2] In any event, it is clear that, a debtor having procured a release of his property by the execution of an undertaking conforming to the requirements of section 555 of the Code of Civil Procedure, except in the case of an insolvent debtor, a demand for the return of the released property is a condition precedent to a right of action upon the undertaking.[3] If, in any case, an undertaking may be deemed to take the place of the property attached, so that whatever would have worked a dissolution of the attachment lien shall have a like effect upon the undertaking, it is when, and only when, the bond is statutory, and is conditioned for the redelivery of the property.[4]

A bond given to release an attachment, though in the form of an obligation of the defendant to pay the judgment, does not operate as a bond to stay execution on the judgment.[5]

Action against more than one defendant.—In the event that the action is against more than one defendant, the acceptance by the sheriff of an undertaking executed by any one defendant, for the release of his property, does not oblige the sheriff to release from attachment, or prevent him from attaching, any property of any other de-

20. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 21, 53 Pac. 444, not sustained).

1. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066.

2. Metrovich v. Jovovich, 58 Cal. 341.

3. See infra, § 96.

4. Turner v. Fidelity & Deposit Co., 33 Cal. App. Dec. 118, 194 Pac. 58; Opinion by Supreme Court, See 187 Cal 76, 200 Pac 959.

5. Bailey v. Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.

fendant. Nor will such defendant thereby be rendered answerable for any demand against any other defendant.[6]

§ 95. Accrual of Liability of Obligors Generally.—The accrual of the liability of sureties on an undertaking executed to procure the release of attached property depends, of course, upon the terms of the undertaking. When the bond is an ordinary bail bond, and is not of the character that a release of the property from attachment must, by compulsion of law, follow its delivery, but the sureties unconditionally promise to pay any judgment the attachment plaintiff may recover in the action, their liability accrues immediately upon a recovery of judgment by the plaintiff.[7] Likewise, if the undertaking is given under section 540 of the Code of Civil Procedure, conditional that the sureties will on demand pay any judgment the plaintiff may obtain, their liability on the undertaking becomes fixed upon judgment being rendered in favor of the plaintiff.[8] But the condition of a bond given under sections 554 and 555 of the Code of Civil Procedure for the release of attached property requires the redelivery thereof to the sheriff if the plaintiff recovers judgment in the action, and it is on the default of such redelivery that a surety ordinarily becomes liable to the plaintiff.[9] Even under a bond of the latter sort, however, when the ability of the defendant to return the property has ceased through his having become insolvent, the recovery of a judgment alone, by the plaintiff, is sufficient to fix the lia-

6. Code Civ. Proc., § 540, as amended May 26, 1917; Stats. 1917, p. 938; Code Civ. Proc., § 868, as amended May 26, 1917; Stats. 1917, p. 939 (applying particularly to attachments issuing from justices' courts).

7. Turner v. Fidelity & Deposit Co., 33 Cal. App. 148, 194 Pac. 58 (holding that death of defendant pending appeal from judgment for plaintiff did not release sureties). 62L 76; 200 Pac 959. (See "Erratum", 1926 Supp. 214) Opinion by Supreme Court, Sec 187

8. March v. Barnet, 121 Cal. 419, 66 Am. St. Rep. 44, 53 Pac. 933 (decision in same case rendered in department, 5 Cal. Unrep. 863, 51 Pac. 20, not sustained); McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727.

9. McCormick v. National Surety Company, 134 Cal. 510, 66 Pac. 741.

bility of the sureties.[10] And where the form and substance of the undertaking are in strict conformity with the provisions of the code, there can be no condition in it that plaintiff shall recover judgment against all of those who are made defendants; a judgment against any one or more of the defendants is sufficient.[11]

In the absence of a statute authorizing the direct collection from the sureties of the judgment against the defendant, or of an express covenant on the part of the sureties that a judgment in the nature of a judgment by consent shall be taken against them on the entry of a judgment against the defendant, the portion of a judgment against the defendant authorizing proceedings against the sureties is mere surplusage and in no way determinative of the rights of the parties to the undertaking.[12] Where the bond is in its term joint and several, the dismissal of the action as against one of the sureties does not impair or affect the maintenance of the action upon the several obligation of the other surety.[13] An undertaking exacted by a sheriff before releasing property which he has ascertained to be exempt from execution is void for want of consideration, and no liability can arise thereon.[14]

§ 96. Necessity of Demand.—The general rule that when an obligation itself makes a demand upon the obligors, a condition precedent to a right of action upon the obligation applies to attachment undertakings, whether they are strictly statutory or not.[15] And under a bond

10. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 21, 53 Pac. 444, not sustained).

11. McCormick v. National Surety Co., 134 Cal. 510, 66 Pac. 741; McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727; Heynemann v. Eder, 17 Cal. 433 (decided under the Practice Act).

12. Holladay v. Hare, 69 Cal. 515, 11 Pac. 28.

13. Fresno Home Packing Co. v. Hannon, 16 Cal. App. 284, 116 Pac. 687.

14. Servanti v. Lusk, 43 Cal. 238 (construing the Practice Act).

15. Kanhouse v. Brand, 11 Cal. App. 669, 106 Pac. 120. See as to demand as condition precedent generally, ACTIONS, vol. 1, p. 340.

given for the release of attached property, conditioned as required by section 555 of the Code of Civil Procedure, that if plaintiff recover judgment, defendant will, on demand, redeliver the attached property to the proper officer, to be applied on the payment of such judgment, or in default thereof, the defendant and sureties will, on demand, pay to plaintiff the full value of the property released, not exceeding the amount of the bond, the liability of the sureties, as a general rule, does not arise until a demand and refusal of the defendant to redeliver the attached property; and, when such demand and refusal has been made, a further demand upon the obligors of the bond for the payment of the value of the property is essential to a right of action upon the bond.[16] However, as succinctly stated in the code: "If one of the alternative acts required by an obligation is such as the law will not enforce, or becomes unlawful, or impossible of performance, the obligation is to be interpreted as though the other stood alone."[17] Hence a demand need not be made upon an insolvent debtor for the return of the property before an action can be maintained against the sureties on his bond to release attached property.[18] Where the liability of the principal and sureties is by the terms of the bond joint and several, and only the sureties are sued without joining the principal, it is sufficient to make demand upon the sureties alone.[19] And if the undertaking for release provides that the defendant in the attachment suit will, on demand, pay to the plaintiff the amount of whatever judgment may be recovered in the action, when demand for payment of the judgment is made upon the defendant and refused the sureties become immediately

16. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; affirmed, 6 Cal. Unrep. 483, 61 Pac. 950; Pierce v. Whiting, 63 Cal. 538.

17. Civ. Code, § 1451.

18. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (hearing of department in same case, 6 Cal. Unrep. 21, 53 Pac. 444, not sustained).

19. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; affirmed, 6 Cal. Unrep. 483, 61 Pac. 950.

liable, without demand upon or notice to them, and an action may be brought upon the undertaking immediately, without waiting for the day to expire in which the demand was made upon the defendant.[20] The demand may be made by the plaintiff in the action as well as by the officer, but when a redelivery of property is demanded, it is necessary that there should be an officer clothed with authority to receive the property and sell it.[1]

§ 97. Form of Demand.—The legitimate object of a demand is to enable a party to perform his contract, or discharge his liability, according to the nature of it, without a suit at law; and there is no stereotyped form or manner of demand, but any language intended to constitute a demand, and which plainly informs the party of whom the demand is made that he is required to perform the duty or obligation to which the demand refers, is sufficient.[2] A general demand upon the sureties on the bond for release that they fulfill their obligation, as expressed in their undertaking, is sufficient if standing alone, to charge them with their obligation to satisfy the judgment against the defendant, when it is less than the admitted value of the property at the time of the release, and is not inconsistent with a specific demand that they should pay the said judgment, but requires the same thing in different language. A demand upon the sureties "that they pay to the plaintiff the said judgment" is a specific and sufficient demand to charge the sureties where there has been a refusal of the defendant to redeliver the property.[3] The sheriff's return upon execution showing a demand upon the defendant and that the execution was unsatisfied is a sufficient demand for the redelivery of the attached property to sustain an action upon a bond given for its

20. Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072 (citing section 2807 of the Civil Code).

1. Brownlee v. Riffenburg, 95 Cal. 447, 30 Pac. 587.

2. See ACTIONS, vol. 1, p. 340 et seq.

3. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; affirmed 6 Cal. Unrep. 483, 61 Pac. 950.

release after notice by the plaintiff to the sureties of non-delivery of the attached property and demand of payment from them of the amount fixed in the undertaking.[4]

§ 98. **Refusal of Defendant to Redeliver Property.**—The terms of an undertaking given under section 555 of the Code of Civil Procedure are not complied with by an offer by the defendant to return, or by a return, of a portion of the property attached.[5] And where, subsequent to the release of the property attached, it has been subjected by the defendant to a chattel mortgage executed to a third party, the plaintiff, upon the issuance of execution with instructions to levy upon the property attached, is not bound to accept the property burdened with such chattel mortgage, and the refusal of the defendant and the chattel mortgagee to deliver the property to the sheriff, upon his demand therefor, otherwise than upon the payment of such chattel mortgage, is a refusal to redeliver the attached property to the sheriff.[6]

§ 99. **Pleading of Demand.**—Where the obligation of a bond executed to procure the release of attached property is conditional upon demand made upon the defendant in the attachment suit, such demand must be alleged in the complaint in an action upon such bond,[7] and, like all allegations of fact, it should be pleaded with directness and certainty.[8] A complaint, in such a case, which fails to allege or show a demand upon the attachment defendant is insufficient to state a cause of action on the bond.[9]

4. Hammond v. Starr, 79 Cal. 556, 21 Pac. 971 (demand on officers of corporation); Mullaly v. Townsend, 6 Cal. Unrep. 483, 61 Pac. 950; affirming 119 Cal. 47, 50 Pac. 1066. See infra, § 100.

5. Metrovich v. Jovovich, 58 Cal. 341. Section 555, Code Civ. Proc., is quoted supra, § 92.

6. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; affirmed, 6 Cal. Unrep. 483, 61 Pac. 950.

7. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; affirmed, 6 Cal. Unrep. 483, 61 Pac. 950; Pierce v. Whiting, 63 Cal. 538.

8. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; affirmed, 6 Cal. Unrep. 483, 61 Pac. 950.

9. Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120.

Likewise, an averment of demand upon the sureties and their refusal to pay the judgment, when there is no such averment as to demand upon the defendant and his refusal to pay the same, does not show a cause of action. Such averments are not inconsistent with the fact that the defendant may not have paid the same.[10] But where the complaint in an action upon such an undertaking alleged that demand was made upon the defendant "for the payment of said judgment, with interest thereon, and costs," and that the defendant neglected and refused to pay "the balance due on said judgment, or any portion thereof," it was held that the allegation of demand and refusal was sufficient, in the absence of a special demurrer, even if a portion of the judgment had been already paid at the time of the demand.[11]

An objection to the sufficiency of an allegation of demand for want of certainty must be by special demurrer pointing out the particular defects complained of, and cannot be urged upon general demurrer to the complaint, nor upon a general objection raised of its sufficiency to state a cause of action, upon a motion for nonsuit which admitted all of its allegations to be sustained by sufficient evidence.[12]

§ 100. Return of Execution as Prerequisite to Action on Undertaking.—As a general rule, where the sheriff takes the statutory undertaking for the release an attachment by him provided for in section 540 of the Code of Civil Procedure, while the writ is still in his hands unreturned,[13] or where, after his authority has ceased by the return of the writ, the court allows a statutory bond pursuant to sections 554 and 555 of the Code of Civil Pro-

10. Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120.

11. Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072.

12. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; affirmed, 6 Cal. Unrep. 483, 61 Pac. 950.

13. Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 Pac. 1124; Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120.

cedure, to release the attachment,[14] the issuance and return of an execution unsatisfied in whole or in part is required by section 552 of the same code as a condition precedent to the right to commence an action thereon. This section contemplates and requires that the plaintiff in the attachment suit shall exhaust his remedy by execution before proceeding against the surety on the undertaking, and a complaint in an action against a surety on an undertaking, given to obtain the release of attached property, which does not show that the remedy by execution has been regularly pursued, and that the execution was regularly returned unsatisfied in whole or in part before the action was begun, is bad on general demurrer.[15] There is an exception to this general rule in the case of an insolvent debtor.[16] But the requirement is not excused by the subsequent bankruptcy of the judgment debtors, where the latter did not obtain a discharge within one year after the adjudication of their bankruptcy, as the National Bankruptcy Act contains no inhibition against the issuance and levy of execution after the lapse of that time.[17]

Where the bond is not such as is provided for in the statute, but is a common-law bond running to the plaintiff in the attachment suit, who by his own action voluntarily released the lien of the attachment, no return of execution is required in order to fix the liability of the sureties upon the bond, or as a prerequisite to a suit thereon.[18]

As soon as the sheriff has made a regular return of the execution unsatisfied, a cause of action accrues upon the undertaking, providing no stay bond on appeal from the

14. Brownlee v. Riffenburg, 95 Cal. 447, 30 Pac. 587; Curtin v. Katschinski, 31 Cal. App. 768, 161 Pac. 764; Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120.

15. Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 Pac. 1124.

16. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804, reversing 6 Cal. Unrep. 21, 53 Pac. 444.

17. Curtin v. Katschinski, 31 Cal. App. 768, 161 Pac. 764.

18. Smith v. Fargo, 57 Cal. 157; Palmer v. Vance, 13 Cal. 553 (decided under the Practice Act); Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120.

judgment has been given to prevent such execution and return,[19] for the attempted levy is considered as the equivalent of a demand upon the defendant.[20] Or, the plaintiff may proceed as in other cases, upon the return of an execution.[1]

§ 101. Effect of Premature Return.—Under section 683 of the Code of Civil Procedure, requiring an execution to be made returnable not less than ten nor more than sixty days after its receipt by the sheriff, an execution cannot be regularly returned before the expiration of ten days after its receipt by the sheriff. However, where the issuance and return of an execution are necessary as a foundation for an action upon an undertaking to release an attachment, the defect of a premature return of the execution is curable by proof that the execution debtor in fact had no leviable property at any time within the minimum lawful period for its return. But the party instituting suit on the undertaking must allege and prove that fact, and a complaint on such undertaking which alleges a premature return of an execution, but is silent as to whether the execution debtor had any leviable property during the required period, fails to state facts sufficient to constitute a cause of action.[2]

§ 102. Discharge of Obligors in General.—The rules applicable generally to the discharge of sureties on bonds apply to sureties on undertakings for the release of attached property.[3] They are entitled to stand upon the very terms of their contract, and if it is changed without their knowledge or consent, they are released from liabil-

19. Code Civ. Proc., § 552; Bailey v. Aetna Indem. Co., 5 Cal. App. 740, 91 Pac. 416.

20. See supra, § 97.

1. Code Civ. Proc., § 542.

2. Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 Pac. 1124.

3. Preston v. Hood, 64 Cal. 405, 1 Pac. 487 (decision in department in same case, 2 Cal. Unrep. 148 not sustained). See SURETYSHIP.

ity.[4] Events which would operate to dissolve the attachment lien had it subsisted can affect their liability only when the bond is statutory and conditioned for a redelivery of the property.[5] In an action upon an undertaking given to procure the release of an attachment, where the condition of the undertaking was, that the property should be released from the attachment, and not that it should be released from the possession of the sheriff, it was held that the fact that the sheriff retained possession of the property after the court ordered the attachment discharged and the property released was no defense, as the retaining of possession by the sheriff thereafter was wrongful, and was not for the plaintiff.[6] And it has been held that the sureties on an undertaking given to procure the release of attached property are not discharged by a stipulation made upon the trial of the action in which the attachment was issued, that no appeal should be taken, and that the judgment to be rendered by the trial court should be accepted as final.[7] But collusion between the defendant and plaintiff in an attachment suit, whereby the plaintiff recovers a larger amount than he is entitled to, will discharge a surety on an undertaking given to release the attachment, whereby the surety undertakes to pay any judgment recovered.[8] The recovery of a judgment by the defendant will, under section 553 of the Code of Civil Procedure, have the same effect, unless the plaintiff has filed an undertaking and perfected his appeal as required by that section; and the liability of the sureties is not revived or affected by a reversal of the original judgment on appeal.[9]

4. Michelin Tire Co. v. Bentel, 60 Cal. Dec. 565, 193 Pac. 770 (amendment of complaint to state new cause of action).

5. Turner v. Fidelity & Deposit Co., 33 Cal. App. Dec. 428, 194 Pac. 58.

6. Gardner v. Donnolly, 86 Cal. 367, 24 Pac. 1072.

7. Meyer v. Jones, 32 Cal. App. 378, 163 Pac. 67.

8. Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 Pac. 1124.

9. Kast v. California Security Co., 32 Cal. App. Dec. 598; Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758. See supra, § 64.

§ 103. Discharge by Tender or Payment of Amount of Judgment.—If the principals in a bond given to a sheriff to release goods from attachment tender to the plaintiff in the attachment suit the full amount of his debt and costs, and the plaintiff refuses to receive the tender, the sureties are discharged from their obligation on the bond; and for the purpose of discharging them, it is not necessary that such tender be paid into court, or kept good. His refusal to accept it is a breach of good faith toward the sureties, and their interests are imperiled by the wrongful acts of the plaintiff.[10] Likewise, the sureties on such a bond are discharged when their liability having become fixed by the rendition of judgment in favor of the creditor, they tender the creditor the full amount of the judgment, and he refuses it. The surety is entitled to pay the debt, and thereby at once acquire the right to proceed against the principal, and the creditor will not be permitted to place obstacles in the way of the surety, which tend to hinder him in the pursuit of such remedies as are guaranteed to him by the law.[11] Payment of the judgment having been made by the sureties, they are entitled to be subrogated to the rights of the judgment creditors only as against the principal on the undertaking, and not as against another defendant not a party thereto.[12]

§ 104. Effect of Bankruptcy or Insolvency of Debtor.—It is settled that, although an adjudication of bankruptcy under the federal Bankruptcy Act of 1898, when pleaded, will have the effect of granting immunity to the defendant from the levy of execution of any judgment obtained against him on his property, such adjudication cannot operate to destroy the rights of a creditor under an under-

10. Curiac v. Packard, 29 Cal. 194 (decided under the Practice Act).

11. Hayes v. Josephi, 26 Cal. 535 (decided under the Practice Act). See SURETYSHIP.

12. March v. Barnet, 121 Cal. 419, 66 Am. St. Rep. 44, 53 Pac. 933; overruling decision in department in same case, 5 Cal. Unrep. 863, 51 Pac. 20, not sustained (action on promissory note).

taking given to release an attachment, or, in other words, will not itself relieve the sureties on the undertaking of their obligations thereunder.[13] And although section 67c of the act provides for the dissolution of attachments levied within four months prior to the filing of a bankrupt petition by the litigant debtor, in certain instances, it is altogether immaterial whether the attachment lien is created within four months prior to or within four months after the commencement of the bankruptcy proceedings, when the attachment has, by virtue of the undertaking, been dissolved before the proceedings in bankruptcy were begun. The bond or undertaking being given for the express purpose of effecting a release of the attachment, the attachment is accordingly released, and such release operates as a sufficient consideration to support the obligation of the bondsmen.[14] Where, under such circumstances, the debtor has pleaded and proved his discharge after the attachment had been levied and released upon the giving of the undertaking, if by the terms of the undertaking recovery of a judgment is made a prerequisite to an action against the sureties, the plaintiff is entitled to have a judgment entered against the defendant with a perpetual stay of execution, so as to prevent the plaintiff from enforcing the judgment against the defendant, and leave him at liberty to proceed against the sureties.[15] Nor will proceedings in bankruptcy affect the jurisdiction of the court to render a judgment of default against the attachment defendant so as to enable the plaintiff to avail himself of his security.[16]

13. Harding v. Minear, 54 Cal. 502 (decided under a similar act); Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858 (construing section 16 of the act).

14. Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858; San Francisco Sulphur Co. v. Aetna Indem. Co., 11 Cal. App. 695, 106 Pac. 111; affirmed, 11 Cal. App. 701, 106 Pac. 113.

15. Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858 (construing sections 16, 67c and 67d of the Federal Bankruptcy Act of July 1, 1898, c. 541, 30 Stats. at Large, 544, 1 Fed. Stats. Ann. 494).

16. Goodhue v. King, 55 Cal. 377.

The same principles have been applied where the debtor has procured his discharge under the insolvent law of the state subsequent to the release of the attached property on security.[17]

§ 105. Pleading in Action on Undertaking.—In order to state a cause of action against a surety upon an undertaking given to procure the release of attached property, the complaint must in some way allege or show that the defendant executed or delivered the undertaking.[18] And the complaint should allege that the property attached was released upon the delivery of the undertaking.[19] A mere reference to the condition of the bond itself, wherein such release is stated as a consideration, is insufficient,[20] regardless of whether the instrument is a common-law bond or a statutory undertaking.[1] However, the complaint need not aver that the property was actually released and delivered to the defendant. As the consideration for the undertaking is the release of the property, if the complaint avers such release, in consequence and in consideration of the undertaking, by order of the court, the actual release and redelivery of the property to defendant is immaterial—the plaintiff having no claim on it after the undertaking was given and the order of release made.[2] Nor need the complaint aver or set out the facts which authorized the issuing of the attachment.[3] And since an action upon an

17. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 21, 53 Pac. 444, not sustained). See BANKRUPTCY; INSOLVENCY.

18. San Francisco Sulphur Co. v. Aetna I. Co., 7 Cal. App. 98, 93 Pac. 888.

19. Jenner v. Stroh, 52 Cal. 504; Williamson v. Blattan, 9 Cal. 500 (decided under the Practice Act); Palmer v. Melvin, 6 Cal. 651 (decided under the Practice Act).

20. Palmer v. Melvin, 6 Cal. 651 (decided under the Practice Act).

1. Jenner v. Stroh, 52 Cal. 504.

2. McMillan v. Dana, 18 Cal. 339 (decided under sections 136 and 137 of the Practice Act, which were similar to sections 554 and 555 of the Code of Civil Procedure).

3. Smith v. Fargo, 57 Cal. 157; McMillan v. Dana, 18 Cal. 339 (decided under the Practice Act); Bailey v. Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.

undertaking given to release an attachment is not an action on the judgment rendered in the attachment suit,[4] such judgment is sufficiently pleaded by an averment that it was recovered, entered and docketed.[5] Breach of the contract, being obviously an essential part of the cause of action, must in all cases be stated in the complaint; and the omission to allege a breach cannot be aided or cured even by verdict.[6] Denials in the answer of the sureties made to allegations in the complaint which are insufficient to raise an issue may properly be stricken out or disregarded by the court.[7] In case of a variance between the allegations of the complaint and the recitals of a copy of the undertaking attached thereto as an exhibit, the allegations of the complaint must control, on appeal, in the absence of a specific objection to the variance in the trial court.[8] In an action on a bond given to release an attachment, a judgment on the pleadings is a judgment on the merits under the code.[9]

§ 106. **Measure of Liability of Obligors.**—The liability of sureties on an undertaking for the release of attached property must be determined by the precise terms of their undertaking.[10] But the contract, when the bond is statutory, must be read by the light of the statute, and interpreted according to the meaning and intention of the

4. McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727; Bailey v. Aetna Indem. Co., 5 Cal. App. 740, 91 Pac. 416.

5. McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727.

6. Morgan v. Menzies, 60 Cal. 341.

7. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1166; affirmed, 6 Cal. Unrep. 483, 61 Pac. 950.

8. San Francisco Sulphur Co. v. Aetna Indem. Co., 11 Cal. App. 695, 106 Pac. 111; affirmed, 11 Cal. App. 701, 106 Pac. 113.

9. Bailey v. Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416 (citing sections 581, 582, Code Civ. Proc.).

10. Curtin v. Harvey, 120 Cal. 620, 52 Pac. 1077; Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; Crocker v. Field's B. & C. Co., 93 Cal. 532, 29 Pac. 225; Pierce v. Whiting, 63 Cal. 538; McDonald v. Fett, 49 Cal. 354; Heynemann v. Elder, 17 Cal. 433 (decided under the Practice Act); Turner v. Fidelity & Deposit Co., 33 Cal. App. Dec. 428, 194 Pac. 58.

parties.[11] Under section 540 of the Code of Civil Procedure the sheriff is required to release the attached property when the defendant gives an undertaking sufficient to satisfy the creditor's demand, or when he gives an undertaking in an amount equal to the value of the property attached. The liability of the surety in the first case is the amount of plaintiff's demand, but in the second case it is the value of the property attached. So where the sureties do not agree in the alternative at all, but only to pay the value of the property, that agreement cannot be extended to include the liability of the defendant in the attachment suit.[12] In an action upon a bond given for the release of attached property, under section 555 of the Code of Civil Procedure, the measure of damages is the value of the property released, not exceeding the amount recovered in the attachment suit, with statutory interest thereon until the date of judgment in the action upon the bond,[13] unless it appears that a portion of the released property has been levied upon and sold by the sheriff under an execution upon the judgment. In the latter case the amount of the proceeds of the sheriff's sale must be deducted.[14] If the judgment recovered by the creditor is less than the value of the property attached as fixed in the bond for release, and less than its admitted value at the time of the release, the payment of the amount of the judgment is the full measure of the obligation of the sureties upon such bond.[15]

§ 107. Assignment of Cause of Action Against Sureties. An assignment by the plaintiff of a judgment obtained by him in an action in which the defendants executed an

11. Heynemann v. Eder, 17 Cal. 433 (decided under the Practice Act).

12. Curtin v. Harvey, 120 Cal. 620, 52 Pac. 1077.

13. Hammond v. Starr, 79 Cal. 556, 21 Pac. 971.

14. Metrovich v. Jovovich, 58 Cal. 341.

15. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; affirmed, 6 Cal. Unrep. 483, 61 Pac. 950.

undertaking for the release of attached property operates as an assignment of the cause of action against the sureties on the undertaking, and entitles the assignee to maintain such action, without a separate assignment of the rights of the plaintiff under the undertaking. In such a case the contract of the sureties cannot be regarded as giving the assignee a collateral right of action. It is given as security for the debt, which was the foundation of the original action, and it is an incident of the judgment.[16]

§ 108. Estoppels Arising from Execution of Undertaking.—The recitals of an undertaking given to procure the release of property from attachment, which are material to the contract of security, are conclusive as between the parties thereto, and in an action upon such an undertaking the parties are estopped to deny their truth or to prove facts in contradiction to them.[17] Whether the undertaking be in statutory form or good only as a common-law bond is immaterial so far as the application of this rule is concerned.[18] The sureties, when sued, are estopped to deny that the bond was given by the defendant in the attachment suit.[19] Nor will they be heard to say that the attachment was not issued and levied; or that the property levied upon was not subject to attachment,[20] or did not belong to the debtor.[1] Whether the property belongs to a third party, or for any legal reason is not

16. Meyer v. Jones, 32 Cal. App. 378, 163 Pac. 67. See ASSIGNMENTS, ante, p. 277 et seq.

17. Code Civ. Proc., § 1982, subd. 2; Tormey v. McIntosh, 30 Cal. App. Dec. 95, 184 Pac. 1012; Pierce v. Whiting, 63 Cal. 538; Smith v. Fargo, 57 Cal. 157; McMillan v. Dana, 18 Cal. 349; Palmer v. Vance, 13 Cal. 553 (holding that a mistake in the recital of the amount for which the attachment issued could be corrected); Bailey v. Aetna Indem. Co., 5 Cal. App. 740, 91 Pac. 416.

18. Bailey v. Aetna Indem. Co., 5 Cal. App. 740, 91 Pac. 416.

19. Tormey v. McIntosh, 30 Cal. App. Dec. 95, 184 Pac. 1012.

20. McMillan v. Dana, 18 Cal. 349 (decided under the Practice Act); Bailey v. Aetna Indem. Co., 5 Cal. App. 740, 91 Pac. 416.

1. Pierce v. Whiting, 63 Cal. 538; Smith v. Fargo, 57 Cal. 157.

subject to the attachment, is a question to be litigated between the plaintiff and the adverse claimant, and does not affect the covenant of the surety.[2] And so far as the recital of the release is concerned, it is immaterial whether or not the property was actually redelivered to the debtor.[3] Furthermore, if, in consequence of the execution of the undertaking required by sections 554 and 555 of the Code of Civil Procedure, the property is actually released, the sureties cannot object that no order of the court for such release is shown to have been made.[4]

The sureties on an undertaking for the release of attached property are also estopped to deny the validity of the attachment proceedings, on the ground that the writ under which the levy was made was invalid,[5] or that the attachment was irregularly issued because of a false affidavit filed by the plaintiff to procure it.[6] They are presumed to have been aware of the facts and to have made the contract accordingly.[7]

The principle of estoppel is as effective to protect the rights of the sureties as those of the creditor. Thus the creditor may, by acts clearly inconsistent with an intent to hold the sureties liable, be estopped to dispute their release.[8]

2. McCormick v. National Surety Co., 134 Cal. 510, 66 Pac. 741; McMillan v. Dana, 18 Cal. 339 (decided under Practice Act).

3. Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072; Preston v. Hood, 64 Cal. 405, 1 Pac. 487 (decision of department in same case, 2 Cal. Unrep. 148, not sustained; McMillan v. Dana, 18 Cal. 339 (decided under the Practice Act).

4. Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 21, 53 Pac. 444, not sustained).

5. Bailey v. Aetna Indem. Co., 5 Cal. App. 740, 91 Pac. 416.

6. Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 Pac. 1124; Bailey v. Aetna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.

7. Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 Pac. 1124.

8. Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156 (in this case the creditor brought an action upon a bond which had been substituted by the sheriff for the original bond for the purpose of releasing one of the sureties thereupon).

XI. DISCHARGE OR DISSOLUTION OF ATTACHMENT.

§ 109. What Operates to Dissolve Attachments Generally.—The levy of an attachment creates mere inchoate rights,[9] which can in no case continue longer than the statute provides they may,[10] and which may be defeated in some instances without reference to the statute.[11] Under sections 556, 557 and 558 of the Code of Civil Procedure, the attachment lien may be defeated by dissolution on a motion by the defendant,[12] and it is immaterial, under these sections, whether much or little or any property of a defendant has been actually levied upon.[13] A dissolution of an attachment may also be affected by a release of the attached property under section 540, or under sections 554 and 555 of the Code of Civil Procedure.[14] And by force of section 553 of the Code of Civil Procedure an attachment may be dissolved by the recovery of a judgment by the defendant in the attachment suit.[15]

§ 110. Insolvency.—Section 21 of the insolvent law of 1895 provides that an adjudication of insolvency "shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings."[16] A similar provision of the insolvent law of 1880

9. Day v. Superior Court, 61 Cal. 489.

10. Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758; Loveland v. Alvord etc. Min. Co., 76 Cal. 562, 18 Pac. 682. See supra, § 73.

11. See infra, § 112.

12. Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669; Sparks v. Bell, 137 Cal. 415, 70 Pac. 281; Kennedy v. California Savings Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; Gessner v. Palmateer, 89 Cal. 89, 13 L. R. A. 187, 26 Pac. 789. See infra, § 113.

13. Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

14. See supra, § 94.

15. See supra, §§ 66, 67.

16. Stats. 1895, p. 131; Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 21, not sustained; decided under a similar provision of the Insolvent Act of 1880); Hefner v. Herron, 117 Cal. 473, 49 Pac. 586. The following cases decided under a similar provision of the insolvent law of 1880 are to the same effect: Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac.

(section 17) was held to be equivalent to an express declaration that an adjudication in insolvency did not affect attachment liens other than those of the class designated.[17] Hence, it would seem to follow that attachments levied more than one month before the insolvency proceedings were instituted would be unaffected by the provisions of the Insolvent Act. The mere filing of a petition for an adjudication of insolvency by creditors against an alleged insolvent debtor, however, does not dissolve an attachment, and is not ground for the dissolution thereof by the court; and the fact that the creditor who issued the writ of attachment is uniting with other creditors in prosecuting the insolvency proceedings is not ground for such dissolution.[18]

In addition to providing that the assignment in insolvency shall dissolve any attachment "made" within one month next preceding the commencement of the insolvency proceedings, section 21 of the Insolvent Act of 1895 provides that whenever such a result shall follow, the assignment shall also vacate and dissolve any judgment or execution entered or levied in any action or proceeding against the debtor commenced subsequently to the action in which the attachment is dissolved. But where, prior to the commencement of the proceedings in insolvency, an

675; Day v. Superior Court, 61 Cal. 489; Cerf v. Oaks, 59 Cal. 132. And see Baum v. Raphael, 57 Cal. 361 (this case was decided under the act of 1876, which provided for the dissolution of attachments levied within two months before the filing of a petition in insolvency); and Taffts v. Manlove, 14 Cal. 47, 73 Am. Dec. 610 (decided under act of 1852, and holding that no attachment could be levied after the filing of a petition in insolvency). See, also, Crane v. Pacific Bank, 106 Cal. 64, 27 L. R. A. 562, 39 Pac. 215 (decided under the Bank Commissioners' Act of 1878, Statutes 1877–78, page 740, which was repealed in 1903, holding that an adjudication in insolvency of a bank, under that act, dissolved an attachment).

17. Vermont Marble Co. v. Superior Court, 99 Cal. 579, 34 Pac. 326; Howe v. Union Ins. Co., 42 Cal. 533.

18. Bertz v. Turner, 102 Cal. 672, 36 Pac. 1014. But see Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac. 675 (decided under the insolvency law of 1880 and holding in effect that the filing of a petition for an adjudication in insolvency was sufficient to dissolve an attachment.

attachment suit has passed into judgment, and property of the insolvent has been seized, and is held a levy of execution, the attachment previously issued has no further existence, and is incapable of being dissolved by the proceedings in insolvency, though the attachment was levied within one month prior thereto, and section 21 of the Insolvent Act has no application to such a case; nor can such judgment and execution be affected by the proceedings in insolvency, but the judgment creditor has the right, as against the assignee in insolvency, to retain and dispose of the property under the execution.[19]

As a general rule, a dissolution of an attachment by an adjudication in insolvency does not inure to the benefit of other lienholders, but to that of the general creditors of the insolvent.[20] It has been held, however, that the fact that an attachment has been dissolved by the operation of the insolvent law will not, in the absence of fraud, prevent the enforcement of an execution levied subsequently and within one month prior to the commencement of the insolvency proceedings.[1]

§ 111. Bankruptcy.—By section 67c of the federal Bankruptcy Act of 1898 it is declared that

"A lien created by, or obtained in, pursuance of any suit or proceeding at law or in equity, including attachment upon mesne process . . . within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if it appears that said lien was obtained and permitted while the defendant was insolvent, and at his instance, and enforcement will work a preference, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent,

19. Hefner v. Herron, 117 Cal. 473, 49 Pac. 586.

20. Cardenas v. Miller, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472; Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169.

1. Elliott v. Warfield, 122 Cal. 632, 55 Pac. 409 (citing Hefner v. Herron, 117 Cal. 473, 49 Pac. 586).

or that such lien was sought and permitted in fraud of the provisions of this act. . . ."[2]

But section 67d of the same act provides that

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, . . . shall not be affected by this act."[3]

It necessarily follows that a lien of attachment, which accrued more than four months prior to the commencement of the bankruptcy proceedings, is not affected by the discharge, and that the only effect of the discharge in such case is to prohibit a judgment which could be made out of any property of defendant other than that which was attached more than four months before the commencement of the bankruptcy proceedings.[4]

§ 112. Death of Defendant.—It seems that the legislature has failed to expressly declare what effect the death of the defendant in an attachment suit will have upon the attachment. The decisions uniformly hold that if the defendant dies after the levy of an attachment upon his property, and before judgment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator, to be administered on in due course.[5] This view of the matter finds support in certain provisions of the code. It is provided by section 669 of the Code of Civil Procedure that

"If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may never-

2. Alexander v. Wilson, 144 Cal. 5, 77 Pac. 706 (holding certain attachment liens created in fraud of the provisions of the act void); Howe v. Union Ins. Co., 42 Cal. 528 (decided under a statute similar to the act of 1898); Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858.

3. Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858.

4. Holladay v. Hare, 69 Cal. 515, 11 Pac. 28; Harding v. Minear, 54 Cal. 502 (these cases were decided under an act similar to the act of 1898). See supra, § 104, as to effect of bankruptcy of defendant on liability of sureties on undertaking for release of attachment.

5. Day v. Superior Court, 61 Cal. 489; Hensley v. Morgan, 47 Cal. 622; Myers v. Mott, 29 Cal. 359,

theless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate."

While section 1504 of the Code of Civil Procedure directs that no execution shall issue upon a judgment against an executor or administrator upon a claim against the estate of a decedent, and that the judgment shall not "create any lien upon the property of the estate, or give the judgment creditor any priority of payment." And, as declared by the court,

"It would seem that if the legislature had intended that the lien of an attachment should be preserved in the event of the death of the defendant before judgment, while at the same time denying the judgment the power to create a lien upon the property of the deceased and forbidding the issuing of an execution upon the judgment, they would have manifested their intention by some unequivocal provision of the statute, and not have left it to be gathered by doubtful implication."[6]

The same rule has been applied where the death of the defendant occurred subsequent to judgment,[7] and although execution had issued,[8] on the ground that in such a case execution could not lawfully issue.

However, section ~~1050~~ 1505 of the Code of Civil Procedure provides that <See "Erratum", 1926 Supp. 216>

"If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands."[9]

89 Am. Dec. 49 (construing the Practice Act). In support of the rule, see, also, Turner v. Fidelity & Deposit Co., 33 Cal. App. Dec. 428, 194 Pac. 58.

6. Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49 (decided under provisions of the Practice Act similar to sections 669 and 1504 of the Code of Civil Procedure).

7. Ham v. Cunningham, 50 Cal. 365.

8. Ham v. Henderson, 50 Cal. 367.

9. Vermont Marble Co. v. Superior Court, 99 Cal. 579, 34 Pac. 326. See EXECUTIONS.

§ 113. Proceedings to Dissolve.—Section 556 of the Code of Civil Procedure provides that

"The defendant may . . . at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued."[10]

It is well settled that under this section each defendant can move to discharge an attachment which, as to him, was irregularly or improperly issued,[11] and the fact that one defendant has taken and perfected an appeal will not prevent another from exercising this right.[12] Furthermore, under the requirements of the section a general appearance is not necessary before a defendant can make his motion to dissolve the attachment.[13] And the motion may be made without any affidavit on his part. Section 557 of the Code of Civil Procedure provides:

"If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the

10. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976 (holding sufficient a notice which stated that the motion would be made on the ground that the attachment was improperly issued, in that the alleged cause of action set forth in the complaint and in the affidavit in support of the attachment were insufficient to bring the alleged claim sued upon within the provisions of sections 537 and 538 of the Code of Civil Procedure, and, further, that the writ was irregularly issued in that the claim sued upon was not for an indebtedness upon a contract, express or implied, for the direct payment of money); Sparks v. Bell, 137 Cal. 415, 70 Pac. 281; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

11. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976; Sparks v. Bell, 137 Cal. 415, 70 Pac. 281; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

12. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976. See APPEAL AND ERROR, § 183, vol. 2, p. 421.

13. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976 (holding that section 554 of the Code of Civil Procedure, relating to the release of attached property after the appearance of the defendant has no application to motions for a discharge under section 556 of the same code).

same by affidavits or other evidence, in addition to those on which the attachment was made."[14]

The service of notice of a motion by the defendant to dissolve an attachment must be made upon the attorney for the plaintiff. The nonresidence of the plaintiff is immaterial, and cannot affect or extend the time required for the service of the notice.[15]

"If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued it must be discharged; provided that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter."[16]

A defendant whose property has been attached does not waive the right to apply for a discharge of the writ because he had previously obtained a release of the property by giving the undertaking required by sections 554 and 555 of the Code of Civil Procedure. The right to make the application under section 556 is expressly given, though the defendant has previously proceeded under sections 554 and 555.[17] The parties may agree that the principal action shall be peremptorily set for trial upon the decision of the motion to dissolve the attachment.[18]

§ 114. Grounds for Dissolution in General.—The defendant in an attachment suit may, under section 556 of the Code of Civil Procedure, apply on motion that the writ of

14. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976.

15. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

16. Code Civ. Proc., § 558; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846 (this case was decided prior to the amendment of section 558 of the Code of Civil Procedure in 1909 by the addition of the proviso). See supra, § 51, as to amendment of writ; § 38 as to amendment of affidavit; § 39 as to amendment of undertaking.

17. Winters v. Pearson, 72 Cal. 553, 14 Pac. 304.

18. Rodley v. Lyons, 129 Cal. 681, 62 Pac. 313.

attachment be discharged "on the ground that it was improperly or irregularly issued."[19] That is to say, on the ground that the cause of action is not one in which a writ can properly issue under section 537 of the Code of Civil Procedure,[20] or that the requirements of sections 538 and 539 of the same code with reference to the attachment affidavit and undertaking have not been complied with;[1] or, that the writ itself is defective, as, for example, due to the fact that it states an amount far in excess of the amount demanded in the complaint in the attachment suit.[2] And a levy of a writ of attachment may be set aside on the ground that the property levied upon was exempt from seizure.[3] So, also, under section 551 of the Code of Civil Procedure, a payment of the judgment in the attachment suit by the defendant entitles him to a release of the property attached.[4]

It is held that section 556 of the Code of Civil Procedure requires that a defendant applying to have a writ of attachment discharged shall state in his notice the par-

19. Sparks v. Bell, 137 Cal. 415, 70 Pac. 281 (several defendants); Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Kennedy v. California Savings Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846; Laughlin v. Thompson, 76 Cal. 287, 18 Pac. 330; Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

20. Stanford Hotel Co. v. Schwind Co., 180 Cal. 348, 181 Pac. 780; Beltaire v. Rosenberg, 129 Cal. 164, 61 Pac. 916 (contract not made or payable in state); Griswold v. Sharpe, 2 Cal. 17 (decided under a similar provision of the Practice Act).

1. Stanford Hotel Co. v. Schwind Co., 180 Cal. 348, 181 Pac. 780; Ralphs v. Bruns, 22 Cal. App. 153, 133 Pac. 997; Fairbanks, Morse & Co. v. Getchell Co., 13 Cal. App. 458, 110 Pac. 331 (void affidavit).

2. Ralphs v. Bruns, 22 Cal. App. 153, 133 Pac. 997.

3. Holmes v. Marshall, 145 Cal. 777, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67, 79 Pac. 534; Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804 (decision of department in same case, 6 Cal. Unrep. 21, 53 Pac. 444, not sustained).

4. Sagely v. Livermore, 45 Cal. 613 (decided under a similar provision of the Practice Act and holding that a mere deposit of the amount of the judgment with the clerk of the court was not a sufficient payment to entitle the defendant to a dissolution of the attachment).

ticular ground on which he relies.[5] Clearly, the plaintiff is entitled to notice of the character of the objections which will be taken.[6] Thus, notice of motions to discharge an attachment on ground that undertaking "is insufficient in form and substance" is not sufficiently specific.[7] And the same is true of a notice of motion to discharge a writ of attachment, "because the said writ was improperly issued."[8] An objection to the sufficiency of a motion to dissolve an attachment on the ground that it recites conjunctively that the attachment was "irregularly and improperly issued," whereas there was no irregularity in its issue, cannot be raised for the first time on appeal.[9]

§ 115. Insufficiency of Complaint.—The rule is well established that upon a motion made under section 556 of the Code of Civil Procedure to dissolve an attachment, it cannot be inquired whether the complaint in the attachment suit is ambiguous, unintelligible or uncertain—that is to say, the motion cannot be made to perform the office of a demurrer to such complaint.[10] Nevertheless, the complaint must be examined to determine whether it sufficiently states a cause of action upon which an attachment will issue under the provisions of section 537 of the Code of Civil Procedure, and if it does not, whether it appears therefrom that it can be so amended as to state such a

5. Donnelly v. Strueven, 63 Cal. 182.

6. Freeborn v. Glazer, 10 Cal. 337 (decided under section 138 of the Practice Act, which was similar to section 556 of the Code of Civil Procedure).

7. Donnelly v. Strueven, 63 Cal. 182.

8. Freeborn v. Glazer, 10 Cal. 337 (decided under the Practice Act).

9. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976.

10. Lathrop v. Francis, 180 Cal. 182, 180 Pac. 1; Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653 (action against nonresidents); Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741 (action against nonresidents); Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911; Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969.

cause of action.[11] If it appears that the complaint can be so amended, the motion, in so far as it concerns the sufficiency of the complaint, should be discharged.[12] Yet, if the complaint fails to state a cause of action and is incurable, the attachment must be dissolved.[13] If a motion to dissolve is made on the ground of the insufficiency of the complaint, the plaintiff may amend at any time before the decision of the motion. As is pointed out supra, however, it seems to be undecided whether he must amend before that time.[14]

§ 116. Irregularities and Defects in Proceedings.—Section 558 of the Code of Civil Procedure provides for the amendment of a writ of attachment, or the affidavit or undertaking upon which it is based, at any time prior to the hearing of an application made under section 556 of the Code of Civil Procedure for the dissolution of the attachment. Clearly, then, a motion to dissolve an attachment cannot be sustained merely because the writ, or the affidavit or undertaking upon which it is based, is defective, if the defects can be cured by amendment.[15] However, this section contemplates the existence of a writ, affidavit, or undertaking which is capable of amendment.[16]

On motion to dissolve for insufficiency of the affidavit, the principal question is whether the cause of action attempted to be stated therein is one upon which an attachment may issue.[17] If the affidavit contains the recitals required by section 538 of the Code of Civil Procedure, it is,

11. Willett & Burr v. Alpert, 28 Cal. App. Dec. 947; Stanford Hotel Co. v. Schwind Co., 180 Cal. 348, 181 Pac. 780; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

12. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

13. Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969.

14. See supra, § 62.

15. Nichols v. Davis, 168 Cal. 570, 143 Pac. 758; Jensen v. Dorr, 157 Cal. 437, 108 Pac. 320.

16. See supra, § 38.

17. Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 Pac. 238 (holding that the sufficiency of the complaint in the attachment suit cannot be considered on such a motion).

of course, sufficient.[18] But the fact that the affidavit, when required by subdivision 1 of this section to do so, fails to contain a statement that the payment of the creditor's claim, "has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property," or that "if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless," constitutes grounds for a motion to dissolve.[19] Likewise, if the affidavit literally follows the language of this subdivision and makes a statement in alternative form that the payment of the claim is not secured, or if originally secured, the security has become valueless, it is defective.[20] And if, in spite of recitals in the affidavit to the contrary, it actually appears that the claim sued upon is secured,[1] or that the security has not become valueless,[2] the debtor is entitled to have the attachment dissolved. The value of the security, or its sufficiency to cover the amount of the claim it is intended to secure, however, are matters not to be inquired into on a motion to dissolve the attachment.[3]

That the writ is issued for a greater amount than that stated in the affidavit is a ground for a motion to dis-

18. Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653 (action against nonresidents). See supra, §§ 29–37.

19. Nichols v. Davis, 168 Cal. 570, 143 Pac. 758 (holding that if the mere denial by affidavit on a motion to dismiss an attachment of the truth of the attachment affidavit is to be considered as shifting the burden of proof to the attaching creditor, this burden is met, as to the claim that the debt sued on was secured by assignments of contracts, by an affidavit declaring in detail the purposes for which the assignments were made, which is accepted by the trial court as true); Gessner v. Palmateer, 89 Cal. 89, 13 L. R. A. 187, 26 Pac. 789; Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609.

20. O'Connell v. Walker, 12 Cal. App. 694, 108 Pac. 668. See supra, § 30.

1. Fisk v. French, 114 Cal. 400, 46 Pac. 161; Kinsey v. Wallace, 36 Cal. 462 (decided under the Practice Act).

2. Barbieri v. Ramelli, 84 Cal. 174, 24 Pac. 113.

3. Beaudry v. Vache, 45 Cal. 3 (decided under the Practice Act).

solve.[4] So, also, the failure of the sureties on the undertaking for the attachment to justify will furnish grounds for dissolution.[5] It is error to dissolve an attachment solely on the ground of the insufficiency of the undertaking of the creditor when the same is sufficient.[6]

§ 117. Evidence.—Irregularities which warrant the discharge of the writ will usually appear upon the face of the affidavit or undertaking, or, where properly but prematurely issued, by a comparison with the summons and complaint. Where, however, the attachment has improperly issued, that is to say, in a case not provided for by the statute, the evidence must usually be sought dehors the papers upon which it is evidently founded.[7] And although the complaint and affidavit constitute the record which may be considered without proof upon a motion to dissolve, yet when the motion is not addressed to any defect appearing upon the face of the complaint or affidavit, but upon matters appearing outside thereof, the moving party must introduce evidence in proof of these facts; otherwise, his motion should be denied.[8] When the motion to dissolve is based upon the ground that the claim of the plaintiff is secured, he may introduce evidence tending to show that the alleged security was never in fact operative.[9] But the plaintiff need not introduce evidence in regard to security which will prove nothing more than that which is admitted.[10] If no valid attachment has been levied against a nonresident's property at the time when judgment was entered, and this fact is made to appear by the files and records of the court, he is entitled

4. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

5. La Dow v. National Bldg. etc. Co., 11 Cal. App. 308, 104 Pac. 838.

6. Cahen v. Mahoney, 2 Cal. Unrep. 709, 12 Pac. 300.

7. Sparks v. Bell, 137 Cal. 415, 70 Pac. 281; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

8. Goldman v. Floter, 142 Cal. 388, 76 Pac. 58.

9. Rodley v. Lyons, 129 Cal. 681, 62 Pac. 313.

10. Nichols v. Davis, 168 Cal. 570, 143 Pac. 758.

to have his motion to set aside the judgment and also his motion to vacate and dissolve the attachment granted.[11]

An attachment defendant may support his motion to dissolve by affidavits.[12] In such a case, "but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made."[13] Affidavits on the part of the defendant not denied by the plaintiff are deemed to be admitted as true.[14] When the affidavit of the defendant is fully answered by the affidavits produced on behalf of the plaintiff, it is error to dissolve the attachment.[15]

§ 118. Appeal from Order Dissolving or Refusing to Dissolve.—It has been held that in the absence of express statutory provision therefor, there can be no appeal from the decision of the court on a motion to dissolve an attachment.[16] However, the code expressly authorizes an appeal from an order dissolving or refusing to dissolve an attachment within sixty days from the entry of the order.[17] And in view of these provisions, it cannot be objected to such an appeal that the lien of the attachment was not preserved because the appeal was not perfected

11. Merchants' Nat. Bank v. Buisseret, 15 Cal. App. 444, 115 Pac. 58.

12. Nichols v. Davis, 168 Cal. 570, 143 Pac. 758; Barbieri v. Ramelli, 84 Cal. 174, 24 Pac. 113.

13. Code Civ. Proc., § 557; Cahen v. Mahoney, 2 Cal. Unrep. 709, 12 Pac. 300.

14. Sparks v. Bell, 137 Cal. 415, 70 Pac. 281 (misnomer of defendants in complaint corrected by affidavit of defendants).

15. Cohen v. Mahoney, 2 Cal. Unrep. 709, 12 Pac. 300.

16. Allender v. Fritts, 24 Cal. 447 (decided under the Practice Act).

17. Code Civ. Proc., §§ 963 (subd. 2), 939; Risdon etc. Wks. v. Citizens' etc. Co., 122 Cal. 94, 68 Am. St. Rep. 25, 54 Pac. 529 (holding order discharging writ of attachment in respect to particular property claimed not to be liable to seizure under the writ appealable); Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95; Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902; Steinberg v. Jacobs, 21 Cal. App. 765, 132 Pac. 1060; Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81. See APPEAL AND ERROR, § 36, vol. 2, p. 178.

within five days, and the undertaking on appeal was not for double the amount claimed, as required by sections 553 and 946 of the Code of Civil Procedure.[18] The well-settled rule that an appellate court will not interfere if the decision of the trial court can be upheld upon any ground applies in such cases.[19] Furthermore, a decision on a motion to dismiss an attachment, based upon conflicting evidence, will not be disturbed on appeal.[20] An order denying a motion to vacate a prior writ of attachment, which is not shown to have become final, cannot be considered on an appeal from an order refusing to dissolve a subsequent writ issued in the same action.[1] And it is held that an order refusing to vacate a previous order dissolving an attachment is not an appealable order, and an appeal therefrom will be dismissed.[2]

Action against nonresidents.—Nonresidents are in no different position from that of a resident defendant who chooses, in the ordinary course of a civil action, to raise a question about the validity of an attachment or the jurisdiction of the court. Thus, where property situated in this state, belonging to nonresidents, is attached in an action against them, prohibition will not lie to restrain the plaintiff from proceeding with the action, upon the ground that the action is one in which no attachment will lie, there being a remedy by appeal from an order refusing to dissolve.[3]

§ 119. Record on Appeal.—Under rule 29 of the supreme court, the record on appeal from an order dissolv-

18. Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95.

19. Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976; Rodley v. Lyons, 129 Cal. 681, 62 Pac. 313. See APPEAL AND ERROR, vol. 2, p. 852.

20. Nichols v. Davis, 168 Cal. 570, 143 Pac. 758; Kern Valley Bank v. Koehn, 157 Cal. 237, 107 Pac. 111; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Egener v. Juch, 101 Cal. 105, 35 Pac. 432, 873.

1. Kern Valley Bank v. Koehn, 157 Cal. 327, 107 Pac. 111.

2. Steinberg v. Jacobs, 21 Cal. App. 765, 132 Pac. 1060 (citing Code Civ. Proc., § 963).

3. Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49.

ing an attachment should be presented by a bill of exceptions. But it is not necessary, under section 649 of the Code of Civil Procedure, which provides for the presentation of a bill of exceptions to a decision at the time of the ruling, that the bill be presented at once, in order to give the party excepting the right to have it settled and allowed. This section is in terms permissive, and it is sufficient if the bill is presented within a reasonable time after the order excepted to has been entered. The analogy furnished by sections 650 and 651, of the Code of Civil Procedure should determine what is a reasonable time.[4] Evidence contained in a bill of exceptions which was not considered on the hearing of the motion from which the appeal is taken cannot be considered upon the appeal.[5]

The complaint and affidavit constitute the record upon which the writ is based, and on any motion attacking the attachment they constitute part of the record of which the court must take notice.[6] On the other hand, unless the undertaking on attachment be referred to in, or be made part of, the statement on appeal, it will not be regarded as a portion of the record by the appellate court.[7] However, where the undertaking is not incorporated in the record, it must be presumed, in the absence of a contrary showing, that it was in due form, and in its execution and terms fully complied with the requirements prescribed by law.[8]

§ 120. Review of Order on Appeal from Judgment in Principal Action.—An order dissolving or refusing to dis-

4. Smith v. Jordan, 122 Cal. 68, 54 Pac. 368; Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863. See APPEAL AND ERROR.

5. Bertz v. Turner, 102 Cal. 672, 36 Pac. 1014.

6. Goldman v. Floter, 142 Cal. 388, 76 Pac. 58.

7. Wheeler v. Farmer, 38 Cal. 203 (decided under the Practice Act). See APPEAL AND ERROR, § 397, vol. 2, p. 692, for discussion of rule that matters not appearing in the record cannot be considered on appeal.

8. La Dow v. National Bldg. etc. Co., 11 Cal. App. 308, 104 Pac. 838. See supra, §§ 39–42, as to statutory requirements.

solve an attachment is not a judgment within the meaning of section 577 of the Code of Civil Procedure.[9] Although some of the earlier decisions are to the effect that the ruling of a trial court upon a motion to dissolve an attachment may be reviewed on an appeal from the judgment in the principal action,[10] the prevailing view is that the judgment in the principal action is in no way dependent upon the attachment proceedings, and is precisely the same whether or not the attachment is dissolved; and that in consequence questions in regard to a motion to dissolve an attachment cannot be considered upon an appeal from such judgment.[11]

XII. INTERVENTION.

§ 121. Right to Intervene.—For the purpose of protecting their rights, interested parties may, under section 387 of the Code of Civil Procedure, intervene in attachment proceedings at any time before trial. And the fact that the intervenor might protect his interests in another way is immaterial.[12] In general, the interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. Such interest must be one created by a claim to the demand, or some part thereof in suit, or a claim to or lien upon the property, or some part thereof which is the sub-

9. Crews v. Mayo, 165 Cal. 493, 132 Pac. 1032.

10. Calderwood v. Peyser, 42 Cal. 110; Taaffe v. Rosenthal, 7 Cal. 514; Reiss v. Brady, 2 Cal. 132; Griswold v. Sharpe, 2 Cal. 17 (these cases were decided under the Practice Act).

11. Herman v. Paris, 81 Cal. 625, 22 Pac. 971; Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49 (decided under the Practice Act); Allender v. Fritts, 24 Cal. 447 (decided under the Practice Act); Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902.

12. Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; Coffey v. Greenfield, 55 Cal. 382.

ject of litigation.[13] The assignee of an insolvent debtor is clearly entitled to intervene in attachment proceedings.[14] And it is well settled that, under Code of Civil Procedure, section 387, an attachment or execution creditor has a right to intervene, and, upon a proper showing, defeat the lien of a prior attaching creditor.[15] Claimants of the latter classes, though not having a claim to or lien upon property which is the direct subject of litigation, do have a lien upon property which is held subject to the results of litigation.[16] General creditors of the defendant in an attachment suit, having no lien either general or specific upon the property involved, cannot properly intervene in such proceedings.[17] When the intervenor's claim has been shown to be a valid and subsisting one, the only remaining question of importance is whether the plaintiff in the attachment suit acquired a valid lien on the property of the debtor by his levy.[18] The court may properly allow an intervention by an ex parte order.[19]

Proceedings by preferred claimants under section 1206 of the Code of Civil Procedure to enforce their claims for services or labor against an attachment debtor are in the nature of an intervention.[20]

13. Kimball v. Richardson-Kimball Co., 111 Cal. 392, 43 Pac. 1111 (citing and quoting from Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569); Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157 (decided under the Practice Act). As to intervention generally, see PARTIES.

14. Susskind v. Hall, 5 Cal. Unrep. 304, 44 Pac. 328.

15. McEldowney v. Madden, 124 Cal. 108, 56 Pac. 783; Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; Coffey v. Greenfield, 55 Cal. 382. The following decisions rendered under a similar provision of the Practice Act are to the same effect: Coghill v. Marks, 29 Cal. 673; Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157; Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184.

16. Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157 (decided under the Practice Act).

17. Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569 (decided under the Practice Act).

18. Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184 (decided under the Practice Act).

19. Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111.

20. Legg & Shaw Co. v. Worthington, 157 Cal. 488, 108 Pac. 284;

§ 122. Determination of Rights.—The rights of intervenors are, of course, subject to the priority of prior valid attachments.[1] And it has been held that where the debt on which an attachment was issued was not due when the suit was commenced, a subsequent attaching creditor cannot, by intervention, postpone the lien of the first attachment to his own, unless the plaintiffs in the first action fraudulently commenced their action.[2] However, there is authority to the effect that an attachment issued upon a debt not wholly due is void under any circumstances.[3]

As between themselves, intervenors are entitled to take in the order of the priority of their respective attachments.[4] And on the dismissal of a case as to one of several intervening attachment creditors without a finding as to the relative priorities or dates of the levy of their attachments, such intervenor is not estopped from claiming priority or preference for the levy of his attachment over that of the other intervenors.[5] Where a subsequent attaching creditor intervenes in the suit between a prior attaching creditor and the common debtor, and no question is raised as to the honesty of his debt, his judgment against the common debtor is admissible in evidence to show that the common debtor owed him, and is decisive of the question.[6]

§ 123. Pleading and Practice.—When a subsequent lienholder, seeking to intervene in an attachment suit, alleges facts showing that the plaintiff in such attachment suit has no cause of action against the defendant, and that the attachment therein is null and void, that the property

Carter v. Green Mountain Gold Min. Co., 83 Cal. 222, 23 Pac. 317, See LIENS.

1. Strong v. Stapp, 74 Cal. 280, 15 Pac. 835. See supra, §§ 70–87, as to priorities.

2. Coghill & Co. v. Marks, 29 Cal. 672 (decided under the Practice Act).

3. See supra, § 19.

4. Adams v. Woods, 9 Cal. 24 (decided under the Practice Act).

5. Deering v. Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801.

6. Coghill & Co. v. Marks, 29 Cal. 673 (decided under the Practice Act).

attached is insufficient to pay the intervenor's claim, and that defendant has not sufficient property to pay both the intervenor and the plaintiff, it is error to deny the right of intervention.[7]

Allegations in the pleading on the part of the intervenor traversing the complaint, in the attachment suit, have the same effect as denials in an answer, and require affirmative proof by the plaintiff of his cause of action, in default of which the intervenor will have judgment in his favor. But, on judgment being rendered in favor of the intervenors, it is error for the court to enter an order entirely setting aside the plaintiff's attachment. Such an order should be modified so as merely to postpone the plaintiff's lien to that of the intervenors.[8]

If the whole complaint in intervention is not set out in the record, it will be presumed upon appeal that a demurrer thereto was properly overruled.[9] The fact that a defendant, whose property had been attached, filed an evasive answer under oath, which admitted the indebtedness sued on, and then, on trial between an intervenor, a subsequent attaching creditor, and the plaintiff, without intimating that he would do so, testified that the debt was not due, was held to be sufficient cause for a new trial on the ground of surprise.[10]

XIII. WRONGFUL ATTACHMENT.

§ 124. Remedies—Elements of Cause of Action.—When an attachment is sued out and levied upon the property of a defendant in an action, and the plaintiff therein has failed to maintain his action, two remedies are open to the attachment defendant; he may sue upon the undertaking

7. McEldowney v. Madden, 124 Cal. 108, 56 Pac. 783.

8. Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157 (decided under the Practice Act).

9. Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111.

10. Coghill & Co. v. Marks, 29 Cal. 672 (decided under the Practice Act).

on attachment,[11] or maintain an action for damages for malicious attachment.[12] The remedy on the attachment undertaking is sustained by allegation and proof that the writ was wrongfully procured—that there was no debt due from the attachment defendant when it was issued and levied. It is not therefore necessary to aver malice and want of probable cause for the issuance of the attachment, but simply that the attachment was wrongfully procured and levied.[13] Furthermore, the fact that the attachment was malicious does not affect the liability of the sureties on the undertaking.[14]

When, however, the attachment defendant undertakes to proceed against the attachment plaintiff alone and independent of any right of action upon the bond, he must allege and show malice and want of probable cause on the part of the attachment plaintiff as required by the principles of the common law in actions for malicious prosecution. The averment of malice and want of probable cause go to the very gist of the action by the attachment defendant, and no recovery can be had unless these essential elements of liability are alleged and established by the evidence.[15] Moreover, in order to entitle a plaintiff to recover in an action for damages for a malicious attachment, he must allege and prove that the writ was executed by attaching his property. The mere malicious suing out of such a writ, without probable cause, without levying it upon the property of the party against whom it is issued, will not authorize a recovery.[16]

11. Vesper v. Crane Co., 165 Cal. 36, L. R. A. 1915A, 541, 130 Pac. 876; Morneault v. National Surety Co., 37 Cal. App. 285, 174 Pac. 81. See supra, §§ 39–42, as to undertaking for attachment.

12. Vesper v. Crane Co., 165 Cal. 36, L. R. A. 1915A, 541, 130 Pac. 876; Kinsey v. Wallace, 36 Cal. 462 (decided under the Practice Act).

13. Vesper v. Crane Co., 165 Cal. 36, L. R. A. 1915A, 541, 130 Pac. 876; Elder v. Kutner, 97 Cal. 490, 32 Pac. 563.

14. Elder v. Kutner, 97 Cal. 490, 32 Pac. 563.

15. Vesper v. Crane Co., 165 Cal. 36, L. R. A. 1915A, 541, 130 Pac. 876.

16. Maskell v. Barker, 99 Cal. 642, 34 Pac. 340.

Excessive levies willfully made will render the plaintiff in attachment liable.[17] However, where there was great uncertainty at the time of the levy as to the value of the property attached, and it is subsequently ascertained that its value was greatly in excess of the demand sued for, it does not necessarily follow that the levy was therefore excessive.[18]

The issue of an attachment and a levy of the same on goods, if there is a legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized.[19]

§ 125. Accrual of Right of Action.—According to the well-established rule, the statute of limitations does not begin to run against a claim for damages for the malicious prosecution of a civil action upon an unfounded claim until the action is terminated, although an attachment may have issued in the action.[20] And it has been held that the theory upon which the plaintiff in an action for damages for malicious attachment prosecuted his suit called for the application of this rule; that the dissolution of an attachment not being a judgment within the meaning of the term as defined by section 577 of the Code of Civil Procedure would not give rise to a cause of action for malicious attachment.[1] However, the generally accepted view is that where the gist of the action is the malicious act of the defendant in procuring the issuance and levy of an attachment, the cause of action arises at

17. Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Weaver v. Page, 6 Cal. 681 (decided under the Practice Act).

18. Sexey v. Adkinson, 40 Cal. 408 (decided under the Practice Act).

19. Kohler v. Wells, Fargo & Co., 26 Cal. 606 (decided under the Practice Act).

20. Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112.

1. Crews v. Mayo, 165 Cal. 493, 132 Pac. 1032 (citing Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 Pac. 168, in which case, however, the action was strictly one for malicious prosecution).

the time of the levy, and, under subdivision 1 of section 339 of the Code of Civil Procedure, is barred in two years.[2] Under this view of the matter, the accrual of the cause of action is not postponed until a dissolution of the attachment; nor is a motion to dissolve necessary before commencing the action.[3] Furthermore, it is immaterial whether the property attached is realty or personalty.[4]

The defendant's right of action upon an undertaking given to procure an attachment accrues upon his recovery of a final judgment against the plaintiff.[5]

§ 126. Pleading.—In an action for damages for maliciously suing out a writ of attachment, and causing the same to be levied on the property of the plaintiff, the complaint must aver that the writ was sued out and prosecuted without probable cause.[6] When the complaint in such an action alleges that judgment was rendered and entered in favor of the defendant in the attachment suit, such allegation is sufficient, and it is unnecessary to allege further that the judgment is in full force and effect, and not vacated, set aside, reversed or appealed from. If the judgment is for any reason no longer in force, that fact should be alleged by the defendant in his answer.[7] And if the complaint alleges, in stating what the defendant did in issuing and levying the writ, that the defendant and another filed their undertaking conditioned to pay all the costs and damages that the plaintiff might sustain, it is error for the court to instruct the jury that there are two causes of action set forth in the complaint, namely, one for malicious prosecution and the other on the undertaking. The gravamen of the complaint is the malicious

2. Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112; McCusker v. Walker, 77 Cal. 212, 19 Pac. 382; Sharp v. Miller, 57 Cal. 431.

3. McCusker v. Walker, 77 Cal. 212, 19 Pac. 382; Sharp v. Miller, 57 Cal. 431.

4. McCusker v. Walker, 77 Cal. 212, 19 Pac. 382.

5. Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18.

6. King v. Montgomery, 50 Cal. 115. See supra, § 124.

7. Carter v. Paige, 80 Cal. 390, 22 Pac. 188.

prosecution of the attachment, and the allegations with regard to the undertaking cannot be construed as constituting a separate cause of action.[8]

When the undertaking on the part of the sureties on an attachment bond is that the plaintiff in the attachment suit will pay, the complaint in an action against the sureties is clearly defective for failure to allege a breach if it contains no averment that the plaintiff had not paid, or even that a demand had been made.[9]

§ 127. Damages Recoverable for Malicious Attachment. In the class of actions to which those for malicious attachment belong there is no settled rule as to the amount of damages which may be recovered. The jury are not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration the character and position of the parties, and all the circumstances attending the transaction, and, the elements of malice and want of probable cause being established, may go beyond mere compensatory relief.[10] In assessing damages in this class of cases, however, the ends of justice demand that the court should not allow verdicts to stand which so far exceed all reasonable bounds as to raise a just presumption that they proceeded from passion or prejudice.[11] Where damages awarded by the jury are excessive, the appellate court may direct release of part of damages or award new trial.[12] If the damages caused by the wrongful attachment have not all been sustained at the time of the commencement of the action, resulting damages may be recovered.[13]

8. Sharp v. Miller, 54 Cal. 329.

9. Morgan v. Menzies, 60 Cal. 341.

10. Kinsey v. Wallace, 36 Cal. 462 (decided under the Practice Act); Weaver v. Page, 6 Cal. 681 (decided under the Practice Act); Breard v. Lee, 192 Fed. 72.

11. Kinsey v. Wallace, 36 Cal. 462 (decided under the Practice Act); Weaver v. Page, 6 Cal. 681 (decided under the Practice Act).

12. Kinsey v. Wallace, 36 Cal. 462 (decided under the Practice Act). See DAMAGES.

13. McCusker v. Walker, 77 Cal. 208, 19 Pac. 382.

One who sues out a writ of attachment, without levying it upon the property of the defendant, is not liable in damages for the publication in a newspaper that the property was attached, and for the transmission of the notice to various commercial agencies, where it does not appear that he caused or was connected in any way with the notices so published and transmitted.[14]

It has been held that, in an action for work and labor, damages from an excessive attachment levy on the defendant's property in the same action constitute no defense or counterclaim within the meaning of section 438 of the Code of Civil Procedure, or matter of cross-complaint within the meaning of section 442 of that code.[15]

§ 128. Damages Recoverable in Action on Undertaking in General.—An undertaking given upon the issuing of a writ of attachment, under section 539 of the Code of Civil Procedure, is a contract,—a contract to indemnify the defendant for all costs that may be awarded to him, and all damages which he may sustain by reason of the attachment, in the event of his recovering judgment. But by that contract the obligors undertake to become liable only for the proximate consequences naturally and ordinarily resulting from the effect of the writ, and not for the remote and possible consequences which in some contingency might follow.[16] Nor do the sureties, by signing the bond, become participants in the seizure or detention of the attached property by the sheriff, or liable as a trespasser for such acts.[17]

14. Maskell v. Barker, 99 Cal. 642, 34 Pac. 340.

15. Jeffreys v. Hancock, 57 Cal. 646. But see Waugenheim v. Graham, 39 Cal. 169 (decided under subdivision 1 of section 47 of the Practice Act, which was similar to subdivision 1 of section 538 of the Code of Civil Procedure, and holding that damages arising from an unjustifiable attachment furnished grounds for a counterclaim in the action).

16. Civ. Code, § 3300; Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; Heath v. Lent, 1 Cal. 410 (decided under the Practice Act).

17. Aigeltinger v. Whelan, 133 Cal. 110, 65 Pac. 125; McDonald v. Fett, 49 Cal. 354.

§ 129. As Dependent upon Character of Property Seized.—There is a marked distinction between cases in which personal property is attached and taken into possession by the sheriff, as it must be to constitute a valid lien, and those in which real estate is taken under a like writ, in so far as the recovery on the bond is concerned.[18] In actions of the latter kind it is improper to admit evidence of depreciation in the value of the property during the existence of the attachment, as such injuries are too remote and cannot be the immediate result of the attachment.[19] Likewise, the impairment of the plaintiff's credit, and his inability to sell the land levied upon or to contract a loan upon the security of such land, are not proximate, but remote consequences of the attachment, and the sureties upon the attachment bond are not liable in damages therefor.[20] In fact, it would seem that where no act beyond the mere levying of the attachment has been done, only nominal damages can be recovered.[1]

Damages for wrongful attachment of personal property, however, are measured by the depreciation in value of the goods attached,[2] exclusive of any damage caused by the willful and negligent acts of the sheriff,[3] and by the plaintiff's loss of its use.[4] But damages due to the loss of the use of property in such cases must be estimated by the market value of its use and not its value to the plaintiff.[5] And where the owner is not actually deprived of the use of his property, as, for example, where it is kept for sale

18. Elder v. Kutner, 97 Cal. 490, 32 Pac. 563. See LEVY AND SEIZURE.

19. Heath v. Lent, 1 Cal. 410 (decided under the Practice Act).

20. Elder v. Kutner, 97 Cal. 490, 32 Pac. 563.

1. Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; Heath v. Lent, 1 Cal. 410 (decided under the Practice Act, holding that counsel fees constitute no part of the damages).

2. Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18; Elder v. Kutner, 97 Cal. 490, 32 Pac. 563; Frankel v. Stern, 44 Cal. 168 (decided under the Practice Act); McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 Pac. 175.

3. Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18.

4. Morneault v. National Surety Co., 37 Cal. App. 285, 174 Pac. 81; McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 Pac. 175.

5. Hurd v. Barnhart, 53 Cal. 97.

only, its depreciation in value alone determines the amount of damages.[6] There is more reason for applying such rule respecting the measure of damages in the case of an attachment of stock, whose principal value consists in its selling value, than in the case of personal property generally. Not only is the selling value destroyed by the attachment, but all of the profits and dividends to accrue from it are impounded equally with the stock itself.[7] Evidence of the cost price of personalty is admissible on the question of its value at the time of the levy.[8]

6. Morneault v. National Surety Co., 37 Cal. App. 285, 174 Pac. 81 (automobile attached).

7. McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 Pac. 175.

8. Bunting v. Salz, 84 Cal. 168, 24 Pac. 167.

(E. H. R.)

ATTEMPT.

See CRIMINAL LAW.

ATTORNEY GENERAL.

1. Nature of Office.
2. Powers in General—Bringing Suits.
3. Exercise of Discretion.
4. Appointive and Supervisory Powers.
5. Control of Litigation.
6. Conduct of Criminal Prosecutions.
7. Abatement of Public Nuisances.
8. Enforcement of Public Trusts and Charities.
9. Duties in General—Power of Legislature.
10. Miscellaneous Duties.
11. Suits by or Against State Officers and Boards.
12. Actions for the Recovery of Public Offices.
13. Suits Against Private Corporations.
14. Recovery of Escheated Property.
15. Compensation of Attorney General and Assistants.

§ 1. Nature of Office.—The office of attorney general in the state of California is an elective one. It is provided by the constitution that the attorney general shall be elected at the same time, places, and in the same manner as the governor, and that his term of office shall be the same as that of the governor.[1] And, it is provided by section 852 of the Political Code, he must reside at the state capital. He is classed primarily as a civil executive officer.[2] The duty cast upon him in this capacity by the legislature of supervising the legal affairs of the state in general[3] has resulted in his designation, by the courts, as

1. Const., art. V, § 17.
2. Pol. Code, § 343; People v. Stratton, 25 Cal. 242.
3. Pol. Code, §§ 470–475.

the chief law officer of the state.[4] As his duties in this regard are ministerial rather than judicial, he is further classified by the code as a ministerial officer of the courts of justice of the state.[5] The attorney general is the official representative of the people in legal matters,[6] and, excepting attorneys representing state boards or officers authorized by law to retain counsel,[7] the courts will not recognize, as such, any attorney other than the attorney general, unless he appears with the consent or approval of the attorney general as provided by section 472 of the Political Code.[8]

As an executive and ministerial officer of the state, the attorney general is under the supervision of the governor, who may direct him to appear on behalf of the state in any suit or legal proceeding in which the state is concerned.[9] His authority ends, of course, at the expiration of his term, and thereafter he cannot represent the state, even with the consent of his successor.[10] The attorney general must execute an official bond.[11] And he is among those public officers specifically named by section 737 of the Penal Code as being liable to impeachment for any misdemeanor in office. A vacancy in the office of attorney

4. People v. Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305; People v. Stratton, 25 Cal. 242.

5. Code Civ. Proc., § 262.

6. People v. Pacheco, 29 Cal. 210.

7. Pol. Code, § 472; People v. La Rue, 95 Cal. 75, 30 Pac. 131 (upholding the power of the board of state harbor commissioners to use the name of the people without the relation of the attorney general).

8. People v. Pacheco, 29 Cal. 210; U'Ren v. State Board of Control, 31 Cal. App. 6, 169 Pac. 615 (holding that section 472 of the Political Code does not apply to the employment of attorneys by state boards and officers for the performance of merely clerical duties). See People v. San Francisco, 36 Cal. 595 (holding that an application for a writ of mandate to compel the performance of some act in which a large number of individuals are interested, which is made in the name of the people, and is not signed by the attorney general, but by an attorney of the relator, will not be dismissed because not made in the name of someone interested, if the attorney general unites in the brief in support of the application).

9. Pol. Code, § 380.

10. People v. Sutter Street Ry. Co., 117 Cal. 604, 49 Pac. 636.

11. Pol. Code, § 473.

general must be filled by a person appointed by the governor, who shall hold his office for the balance of the unexpired term.[12]

§ 2. Powers in General—Bringing Suits.—Whatever authority the attorney general has is derived from the constitution and laws of the state.[13] His powers are not expressly set out in the constitution,[14] but by analogy to the powers exercised by officers of like character in England and in the majority of the United States, it has been conclusively determined that, under the constitution, the attorney general is empowered to bring any action which he deems to be necessary for the protection of the public interests.[15] The established rule of law as to the statute of limitations and its bearing upon cases of this character is that the attorney general may file an information on behalf of the people at any time, and that lapse of time constitutes no bar to the proceeding.[16] Though he cannot institute proceedings in the name of the state merely to subserve private interests,[17] he may so act where the rights of those under its particular protection are concerned. When the proceeding is in the interest of private persons, it is said to be by relation, and under section 810 of the Code of Civil Procedure the relator may be required to give

12. Pol. Code, § 1001.

13. People v. Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305.

14. People v. Stratton, 25 Cal. 242.

15. People v. Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305 (action to quiet title of state to lands in navigable waters constituting a city harbor); People v. Sutter St. R. Co., 117 Cal. 604, 49 Pac. 636; People v. Hibernia Savings etc. Soc., 84 Cal. 634, 24 Pac. 295; People v. Gold Run Ditch & Min. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; People v. Pacheco, 29 Cal. 210; People v. Stratton, 25 Cal. 242 (action for purpose of annulling state patent); California & Northern R. Co. v. State, 1 Cal. App. 142, 81 Pac. 971.

16. People v. Bailey, 30 Cal. App. 581, 158 Pac. 1036. See LIMITATION OF ACTIONS.

17. People v. Stratton, 25 Cal. 242 (holding that an information on the relation of the attorney general, on behalf of the state, to annul a patent, which avers that the state has no interest in the lands patented, does not state facts sufficient to constitute a cause of action).

security for costs.[18] If the proceeding is one in which a private person can have no interest, the proceeding is not properly by relation, and the fact that the attorney general has unnecessarily added that it is by relation of a named person does not convert the proceeding into a private action.[19]

Whether or not the attorney general is authorized by statute to institute proceedings in a particular case, if the legislature expressly recognizes and approves of the pendency and prosecution of the suit, this ratification of his conduct relates back to the filing of the complaint, and is equivalent to an original authorization to commence the action and prosecute it to judgment.[20] The question as to authority to sue in the name of the state is not properly presented by a demurrer for want of capacity in the plaintiff to sue; but the proper practice is to move to dismiss the information on the ground, among others, that the attorney general had no authority or power to institute or prosecute the proceeding in the name of the state. But notwithstanding there is a failure to raise the objection in the regular way, as the authority of the attorney general to sue in the name of the state presents a jurisdictional question, the court is bound to take judicial notice whether he has or has not authority to institute the proceeding under the constitution and laws of the state.[1]

§ 3. Exercise of Discretion.—The attorney general exercises a large discretion in matters of public concern. He is not, however, entirely beyond the control of the courts, in this respect, though they will refuse to interfere except when the abuse of his power is extreme and clearly indefensible. When such an extreme case does not appear, a decree of a court compelling him to act against

18. People v. Sutter Street Ry. Co., 117 Cal. 604, 49 Pac. 736.

19. People v. Sutter Street Ry. Co., 117 Cal. 604, 49 Pac. 736; People v. Stratton, 25 Cal. 242.

20. People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481.

1. People v. Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305.

his judgment is erroneous and is itself an abuse of discretion.[2] Subject to the direction of the governor,[3] the attorney general may exercise his discretion in determining the propriety of instituting legal proceedings in the name of the state,[4] and he may, in a proper case, grant leave to an individual to institute a proceeding in the name of the state. On the other hand, he may refuse to grant such leave when, in his judgment, it is not proper that an action be instituted, and the courts will not ordinarily compel him to act against his judgment in such cases. Thus, the court has refused to grant a mandamus to compel him to grant leave to bring a suit in the nature of quo warranto. An application to the attorney general for leave to sue in the name of the state must be based upon affidavits so full and positive from persons knowing the facts as to make a clear case of right in such a way that perjury may be brought if any material allegation is false.[5]

§ 4. Appointive and Supervisory Powers.—The Political Code provides that the attorney general may appoint an assistant and certain deputies who shall be civil executive officers.[6] Likewise, he may appoint clerks and stenographers for his office.[7] With reference to the appointment of special counsel, his power is limited to those instances expressly provided for by statute.[8] Under section 472 of the Political Code he may employ special counsel when a district attorney becomes disqualified from conducting a criminal prosecution,[9] and under section 3880

2. Lamb v. Webb, 151 Cal. 451, 91 Pac. 102, 646.
3. Pol. Code, § 380.
4. People v. Pacheco, 29 Cal. 210.
5. Lamb v. Webb, 151 Cal. 451, 91 Pac. 102, 646.
6. Pol. Code, § 472.
7. Pol. Code, § 475.
8. Pol. Code, § 472.
9. Toland v. Ventura County, 135 Cal. 412, 67 Pac. 498 (holding that under section 1130 of the Penal Code, the power of the superior court to appoint some other attorney at law to perform the duties of the district attorney on the trial of a criminal action extends only to a sudden emergency caused by the unexpected failure of the district attorney to appear,

of the same code he may employ special counsel in prosecutions of revenue officers. Section 474 of the Political Code provides that he may employ counsel to act in his place in proceedings for the discovery and recovery of escheated property. He has no power, however, to bind the state by a contract to procure the advice of counsel as to the rights of the state in property generally.[10] Nor has he power to appoint an agent for the purpose of giving the requisite notice to a delinquent taxpayer that the state will apply for a deed.[11]

Supervision over district attorneys.—The attorney general has general powers of supervision over district attorneys, and may, whenever in his opinion the public service requires it, assist them in the performance of their official duties.[12] When he thus assists a district attorney, he may, by virtue of his supervisory power, assume a paramount control and direction of the business he and the district attorney are jointly conducting, and may go to the extent of proceeding to set aside a judgment taken by the consent of the district attorney. It has been declared that the court should take judicial notice of the supervisory control of the attorney general, and of the limitations upon the power of the district attorney implied by such supervision.[13]

§ 5. Control of Litigation.—The attorney general has full control of suits instituted by him solely on behalf of the state, and may make such disposition of them as he

and not to a case of long-standing disqualification, incapable of being removed, and well known to the court for a long period before the time of trial. In the latter case, the power of appointing another attorney is vested in the attorney general, under section 472 of the Political Code).

10. People v. Talmage, 6 Cal. 256.

11. San Francisco etc. L. Co. v. Banbury, 106 Cal. 129, 39 Pac. 439.

12. Pol. Code, § 470; County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483. See DISTRICT AND PROSECUTING ATTORNEYS.

13. County of Sacramento v. Central Pac. R. R. Co., 61 Cal. 250.

deems for the best interest of the state.[14] But when a suit is instituted in the name of the state, by the permission of the attorney general upon the relation of the real party in interest, seeking relief, and the state has no direct interest in the event of the suit, the attorney general, as such, has no power to control the conduct of the suit.[15] As has been pointed out, the attorney general may, when he deems it for the best interests of the state, assume full control of legal proceedings which a district attorney is conducting.[16]

Dismissal of suits.—Since the appearance of the attorney general in legal proceedings in which the state is concerned is merely in the capacity of an attorney for a party, he cannot dismiss a pending case on his own initiative. He must apply to the court for such action.[17] And though he may proceed for the dismissal of any suit or proceeding prosecuted solely in the public interest, regardless of the relator's wishes, the situation is different as to cases which also involve an adjudication of the relator's rights, and it has been held that these cannot be dismissed by the attorney general to the prejudice of the relator.[18] This is particularly true where the state has no direct interest in the event of the suit.[19] It is clear that an attempt by an attorney general, after the expiration of his term, to dismiss an action brought by him in the name of the state during his term, is without effect, and the succeeding attorney general is entitled to prosecute the action.[20]

14. People v. Sutter Street Ry. Co., 117 Cal. 604, 49 Pac. 736.

15. People v. North San Francisco H. & R. R. Assn., 38 Cal. 564.

16. See supra, § 4.

17. People v. Sutter St. Ry. Co., 117 Cal. 604, 49 Pac. 736.

18. People v. Clark, 72 Cal. 289, 13 Pac. 858; People v. North San Francisco Homestead & R. Assn., 38 Cal. 564; People v. Jacob, 2 Cal. Unrep. 672, 12 Pac. 222.

19. People v. North San Francisco Homestead & R. Assn., 38 Cal. 564; People v. Jacob, 2 Cal. Unrep. 672, 12 Pac. 222.

20. People v. Sutter Street Ry. Co., 117 Cal. 605, 49 Pac. 736.

§ 6. Conduct of Criminal Prosecutions.—Ordinarily, the attorney general does not conduct the trial of criminal cases, as litigation of this character falls within the duties of district attorneys,[1] over whom the attorney general has certain supervisory powers.[2] However, it is the duty of the attorney general when required by the public service, or directed by the governor, to assist the district attorney in the discharge of his duties.[3] And he may be required by the governor to give his opinion upon a conviction requiring the judgment of death.[4] Further, it has been provided that whenever a district attorney shall, for any reason, become disqualified from conducting any criminal prosecution, the attorney general may employ special counsel to conduct such prosecution.[5] He should, according to an early case, examine the record presented on appeal, in a criminal case, in order to see if it is in a condition to be submitted to the court.[6] The entry of a nolle prosequi is abolished by the code, and the attorney general cannot discontinue or abandon a prosecution for a public offense except upon application to the court for a dismissal.[7] In this connection it may be observed that the attorney general may institute proceedings for the recovery of property forfeited to the state by reason of being offered for disposal in lottery.[8]

§ 7. Abatement of Public Nuisances.—It is well recognized that the attorney general has authority to institute an action in the name of the people to enjoin or abate public nuisances which endanger the public safety or convenience, and require immediate judicial interposition.[9]

1. See DISTRICT AND PROSECUTING ATTORNEYS.

2. See supra, § 4; Sacramento County v. Central Pac. R. Co., 61 Cal. 250.

3. Pol. Code, § 470.

4. Pen. Code, § 1219.

5. Pol. Code, § 474. See supra, § 4.

6. People v. Phillips, 45 Cal. 44. According to the present practice, all briefs and records in criminal cases are prepared in the office of the attorney general.

7. Pen. Code, §§ 1385, 1386.

8. Pen. Code, § 325.

9. People v. Truckee etc. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39

The fact that such nuisance may also work a private injury is immaterial, as the state has the right in all instances to protect its interests.[10]. Nor does the fact that the acts constituting the nuisance are also punishable at criminal law work an exception to the rule.[11] The attorney general is privileged to maintain an action to enjoin a public nuisance on his own information, without the intervention of a private relator,[12] or he may proceed on the complaint of another.[13] So the attorney general may maintain an action to abate or restrain the obstruction of public streets[14] or navigable streams,[15] or for the pollution of the waters of a stream. And he may bring an action to restrain the erection of a purpresture when it is a nuisance or threatens irreparable damage.[16]

§ 8. Enforcement of Public Trusts and Charities.—It is not only the right, but also the duty, of the attorney general to institute an action in the name of the state to enforce public charities or trusts, or to remedy abuses in their management. Generally speaking, such an action

L. R. A. 581, 48 Pac. 374; People v. Beaudry, 91 Cal. 213, 27 Pac. 610; People v. Gold Run etc. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; People v. Blake, 60 Cal. 497; People v. Pope, 53 Cal. 437; Yolo County v. City of Sacramento, 36 Cal. 193; People v. Davidson, 30 Cal. 379. See NUISANCE.

10. People v. Truckee etc. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374. See NUISANCE.

11. People v. Truckee etc. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374; Yolo Co. v. City of Sacramento, 36 Cal. 193.

12. People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374; People v. Beaudry, 91 Cal. 213, 27 Pac. 610; People v. Gold Run etc. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; People v. Davidson, 30 Cal. 379; People v. Stratton, 25 Cal. 242.

13. People v. Pope, 53 Cal. 437; Yolo Co. v. City of Sacramento, 36 Cal. 193.

14. People v. Beaudry, 91 Cal. 213, 27 Pac. 610; People v. Pope, 53 Cal. 437; People v. Blake, 60 Cal. 497.

15. People v. Gold Run etc. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 138; Yolo Co. v. City of Sacramento, 36 Cal. 193.

16. People v. Gold Run etc. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 138; People v. Davidson, 30 Cal. 379.

will not be entertained at all unless he is a party to it. The state, as parens patriae, superintends the management of all public charities or trusts, and, in these matters, acts through her attorney general. The principle and rule governing such cases have been succinctly stated to be that where property affected by a trust for public purposes is in the hands of those who hold it devoted to that trust, it is the privilege of the public that the state should be entitled to intervene by its officers for the purpose of asserting, on behalf of the public generally, the public interest and the public right which probably no individual could be found effectually to assert, even if the interest were such as to allow it. Such was the rule at common law, and it has not been changed in California.[17]

§ 9. Duties in General—Power of Legislature.—Although the constitution is wholly silent with respect to the duties to be performed by the attorney general, and contains no express limitation on the power of the legislature as to the nature of the duties it may impose on this officer, yet a limitation on this power is necessarily implied, from the nature of the office. Such limitation will be found in the general class of duties which the incumbents of similar offices had performed in other states, before the constitution of California was adopted. In assigning such duties, the legislature possesses a wide discretion. But the courts will interfere if the duties assigned are in their nature wholly foreign to the office, and in such a case, the attorney general may refuse to perform them without any breach of his official duty. Thus though the legislature once imposed upon the attorney general the duty of acting as a member of the state board of examiners, as the duties of such officers were wholly foreign to the office of attorney general, he could not, it was declared, be compelled to perform them. Moreover, by no compact be-

17. People v. Cogswell, 113 Cal. 129, 35 L. R. A. 269, 45 Pac. 270. See CHARITIES; TRUSTS.

tween him and the legislature can his official duties as attorney general be extended beyond the limits contemplated by the constitution. And even if he voluntarily performs duties which do not properly appertain to his office, he does not thereby enlarge the scope of his official duties.[18] Mandamus will issue, though, to compel the performance by the attorney general of his lawful duties.[19] Defined generally, the duties of the attorney general are to prosecute all suits or proceedings wherein the state is concerned, and to advise the legislature, and the chief executive and other specified state officers, when required, upon any question of law relating to their offices.[20] It may be noted that the opinions of the attorney general are not of controlling authority, yet, in view of his relation to the general government, and the nature of his duties, they are regarded as having a quasi-judicial character, and entitled to great respect.[1] Where the attorney general appears in a case for the state, as it is his duty to do under the provisions of the Political Code, the state is just as much in court as though regularly summoned as provided under section 1245 of the Code of Civil Procedure, and the jurisdiction of the court is complete.[2]

§ 10. Miscellaneous Duties.—In addition to the general duties set out in section 470 of the Political Code, the legislature has imposed upon the attorney general numerous duties of wide variety. He must be a party to the contract entered into for the publication of court reports.[3] He must pass upon the validity of certificates and docu-

18. Love v. Baehr, 47 Cal. 364. See Lewis v. Colgan, 5 Cal. Unrep. 373, 44 Pac. 1081 (holding that the attorney general does not, by virtue of his appointment to membership on the board of examiners, carry with him for exercise therein the powers conferred upon him by the constitution and laws of the state).

19. County of San Mateo v. Oullahan, 69 Cal. 647, 11 Pac. 386.

20. Pol. Code, §§ 470, 475. See supra, § 1.

1. People v. Shearer, 30 Cal. 645.

2. California & Northern Ry. v. State, 1 Cal. App. 142, 81 Pac. 971. See APPEARANCE, ante, p. 1.

3. Pol. Code, § 778.

ments issued by the insurance commissioner,[4] and of municipal bonds, the purchase of which is being negotiated by the board of control.[5] It is his duty to prepare forms and questions or propositions for ballots,[6] and to assist in the preparation of a digest of election laws for the use of election officers.[7] He must aid in the enforcement of the provisions of the constitution and statutes of the state affecting public utilities.[8] And it seems that it is his duty to inspect the books of revenue officers.[9]

§ 11. Suits by or Against State Officers and Boards.— The attorney general is expressly designated by statute as the attorney for state officers[10] and boards,[11] and must represent them in actions brought by or against them in an official capacity. It is his duty to furnish legal advice and aid to harbor commissioners,[12] and to the commission in lunacy.[13] He is the legal adviser to the department of engineering,[14] and at the direction of the surveyor general must represent the state in actions concerning public lands.[15] He must bring actions to enforce the payment of delinquent taxes, on the direction of the state controller.[16] He must defend actions authorized by statute to be brought against the state treasurer.[17] And he must defend actions against the members of the national guard.[18] The attorney general is the proper person to in-

4. Pol. Code, § 596a.
5. Pol. Code, § 679.
6. Pol. Code, § 1197, subd. 3.
7. Pol. Code, § 1142a.
8. See Public Utilities Act of April 23, 1915, Stats. 1915, p. 115, § 72.
9. Pen. Code, § 440.
10. Pol. Code, § 470.
11. Pol. Code, § 472.
12. Pol. Code, §§ 2608 (San Diego), 2553 (San Francisco).
13. Pol. Code, § 2142a.
14. Act of March 11, 1907, Stats. 1907, p. 215, § 18.
15. Pol. Code, § 3413. See People v. Holladay, 68 Cal. 439, 9 Pac. 655 (holding that the attorney general has no power to submit to the determination of any tribunal the title of the government of the United States to public lands).
16. Pol. Code, § 3899.
17. Pol. Code, § 635e (providing for actions by investment companies for the withdrawal of deposits); Pol. Code, § 3669 (providing for actions by corporations for the refund of taxes).
18. Pol. Code, § 1922.

stitute proceedings against public officers whose acts or omissions require the supervision of a court. Thus, a writ of mandate will be issued on the petition of the attorney general suing in the name of the people to compel an assessor to assess for taxation property liable to be taxed and which he neglects or refuses to assess.[19]

§ 12. Actions for the Recovery of Public Offices.—One of the most important of the attorney general's duties with respect to public officers is that of instituting proceedings for the recovery of public offices from those who wrongfully assume to be the lawful occupants thereof.[20] Under the statute, the attorney general has a wide discretion as to the necessity of instituting quo warranto for this purpose, and the courts will not interfere except when it clearly appears that he has abused his discretion.[1] A quo warranto proceeding prosecuted by the attorney general for the purpose of ousting one charged with wrongfully and without authority of law exercising the powers of a public office is not simply a civil remedy but one wherein the interests of the public are involved, and therefore lapse of time constitutes no bar to such a proceeding.[2] It has been contended that the constitution of 1879 restoring the writ of quo warranto which was abolished by a section of the code of 1872[3] has had the effect of repealing the sections of the code which provide for an action by the attorney general in the name of the people against the usurper of a public office.[4] Whether or not this is true is immaterial, as the power under a writ of quo warranto is quite as broad as under the statute.[5]

19. People v. Shearer, 30 Cal. 645.

20. Code Civ. Proc., § 803 et seq.; People v. Holden, 28 Cal. 123.

1. Lamb v. Webb, 151 Cal. 451, 91 Pac. 102, 646.

2. People v. Bailey, 30 Cal. App. 581, 158 Pac. 1036. See PUBLIC OFFICERS.

3. Code Civ. Proc., § 802.

4. Code Civ. Proc., §§ 803–810.

5. People v. Dashaway Assn., 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 227. See QUO WARRANTO.

§ 13. Suits Against Private Corporations.—The attorney general is authorized by statute to inquire into the affairs of private corporations by quo warranto proceedings,[6] and it is his duty to do so on the request of the governor,[7] or of an interested party,[8] with a view of determining their right to do business.[9] And when he has reason to believe that any corporation, either de jure or de facto, has usurped, intruded into or unlawfully holds or exercises any franchise, he must institute proper proceedings to exclude the corporation from the exercise of such franchise.[10] Moreover, upon notice that a corporation doing business as an investment company has not complied with the laws regulating such associations, he must proceed for its dissolution.[11] And he may institute an action for the dissolution of a swamp-land or reclamation district for nonuser of its corporate powers.[12-13] He is not empowered, however, to maintain an action in behalf of individual stockholders, or creditors, against the directors of a corporation, to prohibit them from transacting any further business of the corporation, on the ground of their alleged negligence, incompetence, mismanagement and fraud.[14] He must institute proper proceedings against insurance corporations which have been certified as insolvent by the insurance commissioners.[15] And it is his

6. Civ. Code, § 358. See CORPORATIONS.

7. Civ. Code, § 382.

8. Pol. Code, § 635i (affecting investment associations).

9. Civ. Code, § 653z (nonprofit co-operative corporations); Civ. Code, § 653k (co-operative business associations); Civ. Code, § 653s (nonprofit co-operative agricultural, viticultural, horticultural associations).

10. Code Civ. Proc., §§ 803-810; People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207.

11. Pol. Code, § 635d. As to the power of the attorney general in this respect under the former Bank Commissioners' Act, see People's Home Sav. Bank v. Superior Court, 103 Cal. 27, 36 Pac. 1015. See, also, BANKS.

12-13. Pol. Code, § 3493. See CORPORATIONS.

14. People's Home Savings Bank v. Superior Court, 103 Cal. 27, 36 Pac. 1015.

15. Pol. Code, § 604. See INSURANCE.

duty to enforce the provisions of the law in regard to unfair competition by corporations.[16] Furthermore, it is provided that he shall bring actions for the recovery of penalties or forfeitures under the Bank Act,[17] or for violation of railroad rate regulations.[18] It is incumbent upon the attorney general to enforce the provisions of the law in regard to foreign as well as domestic corporations and associations.[19] To this end he is authorized to enjoin the carrying on of business within the state by foreign investment corporations which have not complied with statutory regulations concerning them.[20]

§ 14. Recovery of Escheated Property.—Among the duties imposed by the legislature upon the attorney general is that of instituting investigations for the discovery of all real and personal property which may or ought to have escheated to the state.[1] After becoming informed that any estate has escheated, or is about to escheat to the state, he must commence an action on behalf of the state to have it adjudged that the state is so entitled.[2] The authorities agree, though, that the statutes on the subject of escheats when considered together do not contemplate that a proceeding of this kind should be commenced by the attorney general before five years after the death of the deceased, and that it is premature if begun sooner.[3] However, before the lapse of this period of time the attorney general may be directed by the court to assume control of property which may escheat to the state.[4] But the

16. Act of June 10, 1913, Stats. 1913, p. 508. See MONOPOLIES.

17. Civ. Code, Appendix, tit. "Banking," § 144. See BANKS.

18. Civ. Code, § 494. See CARRIERS.

19. Act of March 23, 1907, Stats. 1907, p. 984, §§ 2, 3.

20. Pol. Code, § 653d. See CORPORATIONS.

1. Pol. Code, § 474. See ESCHEAT.

2. Code Civ. Proc., §§ 1269–1272; Pol. Code, § 474.

3. State v. Miller, 149 Cal. 208, 85 Pac. 609; People v. Roach, 76 Cal. 296, 18 Pac. 407 (holding the court is not concluded by an allegation that no heirs exist); State v. Smith, 70 Cal. 153, 12 Pac. 121. See ALIENS; ESCHEATS.

4. Civ. Code, § 1405.

mere possibility that certain property may escheat does not constitute an interest therein sufficient to entitle the attorney general to institute proceedings for the contest of the probate of a will.[5] A failure on the part of the attorney general to institute an action of escheat will prevent the title to property from vesting in the state.[6] Although section 474 of the Political Code provides that the attorney general may inquire into the affairs of corporations for the purpose of discovering property which should escheat to the state, it is clear that the section was intended to provide for a proceeding in court, and neither the attorney general nor counsel employed by him is authorized to examine the books and papers of a corporation with such a purpose except under the order and supervision of the court.[7] But prior to the commencement of such a proceeding, the attorney general need not, under the statute, demand that the books and papers of the corporation be submitted to him.[8]

§ 15. Compensation of Attorney General and Assistants.—The annual salary of the attorney general, to include all services rendered ex officio as member of any board or commission as required by law, is fixed both by the constitution and by statute.[9] Obviously, when his appearance in an action is merely in the performance of his official duty, he is not entitled to any compensation other than his official salary, and the same reason which would prevent him from being entitled to compensation for services he might personally render in an action would

5. State v. Superior Court, 148 Cal. 55, 2 L. R. A. (N. S.) 643, 82 Pac. 672.

6. Estate of Miner, 143 Cal. 194, 76 Pac. 968 (construing the code sections in regard to escheats).

7. People v. German Savings etc. Soc., 72 Cal. 28, 13 Pac. 51; People v. Hibernia Savings etc. Soc., 72 Cal. 21, 13 Pac. 48.

8. People v. Hibernia Savings etc. Soc., 72 Cal. 21, 13 Pac. 48.

9. Const., art. V, § 19; Pol. Code, § 471. See Love v. Baehr, 47 Cal. 364, as to compensation for services not incumbent on him by virtue of his office, prior to the present constitution.

also prevent him from receiving compensation for any person whom he might employ to assist him.[10-11] The compensation of the attorney general's assistant and deputies is provided for by statute,[12] as is that of his clerks and stenographers.[13] It is further provided that the fees of special counsel employed by the attorney general under authority of statute shall be a legal charge against the state,[14] which, in the case of employment for the discovery and recovery of escheated property, must be paid out of the sums found to be escheated and recovered to the state, and not otherwise.[15] Specific appropriations may be made by the legislature for the purpose of defraying traveling expenses incurred by the attorney general in the performance of his official duties.[16]

10-11. People v. Central Pac. R. R. Co., 105 Cal. 576, 38 Pac. 905.
12. Pol. Code, § 472.
13. Pol. Code, § 475.
14. Pol. Code, § 472.
15. Pol. Code, § 474.
16. Marshall v. Dunn, 69 Cal. 223, 10 Pac. 399.

(E H. R.)

ATTORNEY IN FACT.

See AGENCY, vol. 1, p. 748.

ATTORNEYS AT LAW.

I. INTRODUCTORY.
II. RIGHT TO PRACTICE AND ADMISSION TO BAR.
III. RELATION TO COURT AND PUBLIC.
IV. RELATION TO CLIENT.
V. AUTHORITY.
VI. LIABILITY.
VII. COMPENSATION AND LIENS.
VIII. DISBARMENT AND SUSPENSION.

I. Introductory.

1. Scope of Article.
2. Definitions and Distinctions.
3. Survey of California Law.
4. Privileges and Disabilities.
5. Taxation by Municipalities.

II. Right to Practice and Admission to Bar.

6. In General.
7. Jurisdiction to Regulate.
8. Jurisdiction to Admit.
9. Jurisdiction to Examine.
10. Board of Bar Examiners.
11. Procedure for Admission.
12. Eligibility in General.
13. Good Moral Character.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 195 Pac.

14. Attorneys from Other Jurisdictions.
15. Effect of Admission.
16. Setting Aside Order of Admission.

III. Relation to Court and Public.

17. Status as Officers.
18. Statutory Duties Generally.
19. Duties to Court.
20. Criticism of Court.
21. Barratry and Illegal Advertising.

IV. Relation to Client.

CREATION.

22. In General.
23. Who may Employ Attorneys.
24. Assignment by Court.

IMPUTATION OF NOTICE.

25. In General.
26. Failure to Communicate Knowledge.
27. Knowledge Obtained in Prior Transactions.

DUTIES OF ATTORNEY.

28. In General.
29. Requirement of Good Faith.
30. Assumption of Adverse Position.
31. Acquirement of Adverse Interest.
32. Collection of Money.

DEALINGS WITH CLIENT.

33. Validity in General.
34. Requirement of Good Faith and Information.
35. Presumption of Invalidity.
36. Limitations on Presumption.
37. Pleading and Proof.

TERMINATION.

38. Discharge by Client.
39. Withdrawal by Attorney.
40. Death of Client.
41. Death or Removal of Attorney.

SUBSTITUTION OF ATTORNEYS.

42. In General.
43. Right of Client.
44. Availability of Mandamus.
45. Necessity for Substitution.
46. Appeal by Attorney not of Record.
47. Method of Substitution Generally.
48. Method During Appeal.
49. Notice of Application for Change.
50. Notice of Substitution.

V. Authority.

IN GENERAL.

51. Introductory.
52. Delegation of Authority.
53. Ratification of Unauthorized Acts.

APPEARANCE FOR CLIENT.

54. Presumption of Authority.
55. Rebuttal of Presumption.
56. Method of Attacking Presumption.
57. Effect of Unauthorized Appearance.

CONDUCT OF LITIGATION.

58. Statutory Provisions.
59. Judicial Statements of Rule.
60. Control to Exclusion of Client.
61. Acts Exclusively for Attorney.
62. Attorney for One of Several Coparties.

AUTHORITY IN PARTICULAR MATTERS.

63. Institution of Suit.
64. Pleadings.
65. Stipulations Generally.
66. Statute Regulating Stipulations.
67. Compromises.
68. Retraxits, Dismissals and References.
69. Trial.
70. Consent Judgment or Settlement.
71. After Judgment.
72. Appeals.

VI. Liability.

73. Rule as to Negligence.
74. Damage as Essential Element.
75. Liability Limited to Client.
76. What Constitutes Negligence.
77. Actions for Negligence.
78. Actions for Collections.
79. Summary Proceedings for Collections.

VII. Compensation and Liens.

RIGHT OF ATTORNEY.

80. Compensation in General.
81. Attorney Appointed by Court.
82. Surviving Member of Law Firm.
83. Liens of Attorneys.

CONTRACTS FOR STATED COMPENSATION.

84. In General.
85. Time of Making.
86. Construction.
87. Services Covered.
88. Unauthorized Contracts.
89. Division of Fee with Layman.
90. Fees for Survivor of Law Firm.

CONTRACTS FOR CONTINGENT FEES.

91. Validity Generally.
92. Invalidity in Divorce Cases.
93. Rights and Duties Generally.
94. Effect of Compromise.

AMOUNT OF COMPENSATION.

95. Fee Set by Contract.
96. Reasonable Fee.
97. Retaining Fee.
98. Additional Services.
99. Firm or Joint Services.
100. Moneys Expended by Attorney.
101. Effect of Discharge or Compromise.
102. Effect of Negligence.

ACTIONS FOR COMPENSATION.

103. Accrual of Cause.
104. Action on Quantum Meruit.
105. Suit for Specific Performance.
106. Pleadings by Attorney.
107. Pleadings by Client.
108. Evidence as to Value of Services.
109. Evidence as to Miscellaneous Matters.
110. Admissibility of Expert Testimony.
111. Conclusiveness of Expert Testimony.
112. Burden of Proof.
113. Finding and Verdict.
114. Questions on Appeal.

VIII. Disbarment and Suspension.

IN GENERAL.

115. Introductory.
116. Jurisdiction Generally.
117. Jurisdiction of Supreme Court.

GROUNDS GENERALLY.

118. Statutory Declaration.
119. Misconduct Toward Court.
120. Perversion of Justice.
121. Misconduct Toward Client.
122. Character and General Conduct.
123. Acts not Justifying Disbarment.
124. Mitigating Circumstances.

CONVICTION OF CRIME.

125. In General.
126. Crimes Involving Moral Turpitude.
127. Commission or Conviction Outside California.
128. Necessity for Criminal Proceedings.
129. Effect of Appeal, Acquittal or Pardon.

PROCEEDINGS.

130. In General.
131. Initiation of Proceedings.
132. Requirement of Notice.
133. Pleadings Generally.
134. Verification of Accusation.
135. Trial and Evidence.
136. Degree of Proof.
137. Findings and Judgment.
138. Order of Indefinite Suspension.

EFFECT.

139. In General.
140. Relief from Order.
141. Right to Reinstatement.
142. Applications for Reinstatement.
143. Right to Mandamus.

I. INTRODUCTORY.

§ 1. Scope of Article.—The purpose of this article is to consider the status of attorneys at law. It discusses not only the admission of an attorney,[1] but also his disbarment or suspension;[2] and not only his relation to the court and public,[3] but also his relation to his client.[4] As an extension of the latter subject, attention is given to the authority of an attorney at law,[5] to his liability,[6] and to his right to compensation and liens.[7]

Several questions which concern attorneys are more conveniently treated elsewhere. In this class are questions relating to attorneys' fees in particular cases, such as actions for divorce,[8] actions on commercial paper,[9] suits to foreclose mortgages,[10] proceedings in the estate of a deceased,[11] and proceedings for condemnation,[12] mechanics' liens,[13] partition,[14] and street assessments.[15] For the rule that communications between attorney and client are privileged, reference should be made to the article where the general question of privileged communications is discussed;[16] and for the question whether the advice of counsel is a defense in an action for malicious prosecution, to the article where that action is considered.[17] Similarly, other articles should be consulted for consideration of the rights and duties of attorneys in fact,[18] the attorney general,[19] and district and prosecuting attorneys;[20] as well as for matters which merely relate to attorneys incidentally.[1]

1. See infra, §§ 6–16.
2. See infra, §§ 115–143.
3. See infra, §§ 17–21.
4. See infra, §§ 22–50.
5. See infra, §§ 51–72.
6. See infra, §§ 73–79.
7. See infra, §§ 80–114.
8. See ALIMONY.
9. See NEGOTIABLE INSTRUMENTS.
10. See MORTGAGES.
11. See EXECUTORS AND ADMINISTRATORS.
12. See EMINENT DOMAIN.
13. See MECHANICS' LIENS.
14. See PARTITION.
15. See MUNICIPAL CORPORATIONS.
16. See EVIDENCE; WITNESSES.
17. See MALICIOUS PROSECUTION.
18. See AGENCY.
19. See ATTORNEY GENERAL.
20. See DISTRICT AND PROSECUTING ATTORNEYS.
1. See AFFIDAVITS; AMICUS CURIAE; APPEAL AND ERROR; APPEARANCE;

§ 2. Definitions and Distinctions.—No definition of the term "attorney at law" has been found in the California decisions or statutes, but the federal supreme court has said that "persons acting professionally in legal formalities, negotiations, and proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as used in this country."[2] It is clear that one acts as an attorney at law only when he represents another, not when he appears for himself.[3]

The distinction between attorneys or solicitors and counsel or barrister is practically abolished in nearly all the courts of this country,[4] and it will be found that "attorney," "counselor," and "attorney at law" are used synonymously in that portion of the California code which regulates their rights and duties.[5] Attorneys at law must be distinguished, however, from attorneys in fact, who are merely a special type of agent.[6]

The word "retainer" has been defined as "the act of the client, by which he engages an attorney or counselor to manage a cause, either by prosecuting it when he is plaintiff, or defending it when he is defendant."[7]

§ 3. Survey of California Law.—The doctrines of the California law relating to attorneys are for the most part in harmony with the law on this subject prevailing throughout the United States. In a few particulars, however, the California law, largely as a result of statutory influence, is peculiar to this jurisdiction. In this connec-

CHAMPERTY AND MAINTENANCE; CONTEMPT; COSTS; PARTNERSHIPS; STIPULATIONS.

2. National Sav. Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621, see, also, Rose's U. S. Notes.

3. Philbrook v. Superior Court, 111 Cal. 31, 43 Pac. 402.

4. 2 Ruling Case Law, p. 938.

5. Pittman v. Carstenbrook, 11 Cal. App. 224, 104 Pac. 699 (referring to sections 275 to 299 of the Code of Civil Procedure).

6. See AGENCY, vol. 1, p. 748.

7. Knight v. Russ, 77 Cal. 410, 19 Pac. 698 (quoting Bouvier's Law Dictionary).

tion attention may be called to the rule that an attorney controls the conduct of litigation to the exclusion of his client,[8] to the rule that an attorney has implied authority to enter a retraxit or a dismissal having the same effect,[9] and to the rule that an attorney has no lien upon a judgment obtained in favor of his client.[10]

The principal statutory provisions relating to attorneys are contained in sections 275 to 299 of the Code of Civil Procedure, and in section 164 of the Penal Code added by the legislature in 1921, relating to the practice of law by persons not licensed. The sections of the Civil Code, while extremely complete with reference to the admission, substitution and disbarment of attorneys,[11] are very scanty with reference to other matters.[12] Recent amendments have introduced desirable changes in the law relating to admission and disbarment. In 1919 the legislature provided a more satisfactory system for the admission of attorneys by requiring all applicants for original admission to pass a written examination given by a board of state bar examiners.[13] In 1911 it enabled the courts to remove or suspend an attorney for the commission of a crime prior to criminal conviction, even though the offense was not committed in the attorney's professional capacity.[14] The important legislation of 1921 penalizing the unlawful practice of law is referred to in a later section.[14a]

§ 4. Privileges and Disabilities.—Many privileges and disabilities attend the office of an attorney at law. In

8. See infra, § 60.

9. See infra, § 68.

10. See infra, § 83.

11. Eight sections (Code Civ. Proc., §§ 275–281) relate to the admission of attorneys; three sections (Code Civ. Proc., §§ 284–286) relate to the substitution of attorneys); and thirteen sections (Code Civ. Proc., §§ 287–299) relate to the disbarment of attorneys.

12. One section (Code Civ. Proc., § 282) relates to the duties of an attorney, and one section (Code Civ. Proc., § 283) relates to the authority of an attorney.

13. See infra, §§ 6–16, and particularly, §§ 9, 10.

14. See infra, § 128.

14a. See note 12 under § 6, infra.

addition to the right to practice law, which follows from admission to the bar,[15] the implied authority of attorneys,[16] and special rights and duties which depend on the attorney's relation to the court and public,[17] or on his relation to his client,[18] there are several miscellaneous privileges and disabilities which may be noticed at this point in our discussion. For instance, it is provided by the Code of Civil Procedure that attorneys at law, and their clerks, secretaries and stenographers, shall be exempt from liability to act as jurors,[19] and that the professional libraries of attorneys and their necessary office furniture, including one safe and one typewriter, shall be exempt from execution.[20] Again, there are cases holding that attorneys coming into a jurisdiction for the sole purpose of appearing in court to represent their clients are exempt from the service of civil process while so engaged. Nevertheless, there are cases holding quite to the contrary, and there are none, so far as discovered by investigation, going so far as to hold that an attorney who is not an attorney of record and does not become such is entitled to the privilege.[1] Where an attorney is a party to a case, and has no attorney of record representing him, no doubt exists that he may appear in propria persona and conduct his own case, notwithstanding the incidental inconvenience if he is also a witness. Where he has an attorney of record, however, it seems that the court may require that all of the cross-examination be conducted by such attorney and not by the attorney who is a party,[2] on the familiar principle that the attorney, not the party, controls the litigation.[3]

15. See infra, § 15.
16. See infra, § 51 et seq.
17. See infra, §§ 17–21.
18. See infra, §§ 22–50.
19. Code Civ. Proc., § 200, subd. 3.
20. Code Civ. Proc., § 690, subd. 4.

1. Tadge v. Byrnes, 179 Cal. 275, 176 Pac. 439.
2. Carter v. Holt, 28 Cal. App. 796, 154 Pac. 37.
3. See infra, § 60.

§ 5. Taxation by Municipalities.—Although it is beyond the authority of municipal corporations to regulate the practice of law,[4] it is within their power to levy a license tax upon attorneys, pursuant to statutory authority, for it is well settled that a business or occupation may be taxed, under authority to tax for purposes of revenue.[5] Statutory authority to tax attorneys seems to have been given municipal corporations of the sixth class in 1883, it being provided that the boards of trustees of such corporations should have power

"To license, for purposes of regulation and revenue, all and every kind of business authorized by law and transacted or carried on in such city or town, . . . to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."[6]

The portion of this statute giving power to license for purposes of revenue was held to be repealed by implication,[7] however, by a section of the Political Code, subsequently adopted, which provided that

"Boards of supervisors of the counties of this state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purposes of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions . . . to fix the rates of license tax upon the same, and to

4. See infra, § 7.

5. Ex parte Galusha, 61 Cal. Dec. 109, 195 Pac. 406; City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674; Ex parte Johnson, 32 Cal. App. Dec. 218, 190 Pac. 852 (distinguishing taxation of attorneys and taxation of an attorney's business); Overton v City of Los Angeles, 263 Fed. 951 (quoting Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; Royoll v. Virginia, 116 U. S. 572, 29 L. Ed. 735, 6 Sup. Ct. Rep. 510, see, also, Rose's U. S. Notes, where state taxes on attorneys are upheld by dicta or decision).

6. Stats. 1883, p. 93, § 852, subd. 10. As to the similar power of municipal corporations of other classes, see LICENSES.

7. City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674.

provide for the collection of the same by suit or otherwise. . . . "[8]

It seems, however, that the section of the code just quoted no longer operates to repeal earlier acts giving authority to municipal corporations to tax businesses or occupations for revenue, for it is provided, in recent amendments to the section, that

"This act shall not be deemed to repeal any act vesting municipal corporations with power to license for revenue purposes."[9]

If a tax on attorneys is unlawful, equity will not restrain its enforcement, for its validity may be tested by a writ of error from the federal supreme court or a writ of habeas corpus from the state supreme court.[10]

II. RIGHT TO PRACTICE AND ADMISSION TO BAR.

§ 6. In General.—The right to practice law is not a constitutional right, for it is not mentioned in that instrument, or recognized, or established by it. It is a mere statutory privilege, not even rising to the dignity of an office, except in a very limited sense. This privilege is, by the statute granting it, extended to all persons who comply with certain conditions. The right to practice law is valuable to the possessor only. It cannot descend or be inherited, bought or sold, conveyed or transferred, can be divested and destroyed by a mere order of court, is

8. Pol. Code, § 3366, adopted in 1901, by Stats. 1901, p. 635. The words "and not otherwise" were of course the words relied upon as affecting the repeal. City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674.

9. Pol. Code, § 3366, subd. 2, adopted in 1915 by Stats. 1915, p. 723, and re-enacted in 1917 by Stats. 1917, p. 279.

A charter which authorizes a city "to license and regulate under general and uniform laws, any lawful business or calling; to fix the amount of license tax thereon, and to prescribe the manner of enforcing the same," authorizes a license tax on attorneys. Ex parte Galusha, 61 Cal. Dec. 109, 195 Pac. 406.

10. Overton v. City of Los Angeles, 263 Fed. 951.

subject to forfeiture by mere loss of moral character on the part of the possessor, and cannot, therefore, in any proper sense, be deemed "property," or amount to a "contract," in the constitutional meaning of those terms. Payment of a revenue tax to the federal government does not amount to a federal license to practice law during the term of the tax, notwithstanding the requirements of the law of the state.[11]

Various provisions of the California statutes show the necessity for a license to practice.[12] Admission to practice is not required in two special cases, however. In justices' courts, any person, except the constable by whom the summons or jury process was served, may act as attorney.[13] The code provides, however, that no person other than an attorney at law, duly admitted to practice in courts of record, shall be permitted to appear as attorney or agent for any party in any cause or proceeding before a justice's court, or any justice, unless he produce a sufficient power of attorney to that effect, duly executed and acknowledged before some officer authorized by law to take acknowledgments of deeds, which power of attorney or a copy thereof, duly certified by one of the justices, shall be filed among the papers in such cause or

11. Cohen v. Wright, 22 Cal. 293, per Crockett, J.

12. Section 281 of the Code of Civil Procedure reads: "If any person shall practice law in any court, except a justice's court or police court, without having received a license as attorney and counselor, he shall be guilty of a contempt of court." Section 1209 of the same code provides that "assuming to be an officer, attorney, or counselor of a court, and acting as such without authority" is a contempt. Section 161a of the Penal Code provides that "Any person other than a regularly licensed attorney who advertises himself as practicing or entitled to practice law in any court of justice is guilty of a misdemeanor."

Section 164 of the Penal Code, added in 1921, relates to the practice of law by persons not licensed; to the furnishing of legal advice; services and counsel and advertising in connection therewith; and makes violations of its provisions a misdemeanor.

13. Code Civ. Proc., § 842. See, also, Ex parte Hittson, 39 Cal. App. 91, 178 Pac. 149, holding that a disbarred attorney may appear in justices' courts.

proceeding.[14] Again, one who is not an attorney may appear for himself, for one acts as attorney at law only when he represents another.[15]

§ 7. Jurisdiction to Regulate.—The power of the legislature to impose such conditions and qualifications upon the exercise of the privilege of practicing law, as they may deem proper has been fully established.[16] Indeed, it may be said that the manner, terms and conditions of the admission of attorneys to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute.[17] The right to practice law is not an absolute right, derived from the law of nature. It is the mere creation of the statute, and when the license is issued and the official oath taken, which authorizes the attorney to exercise the right, it confers but a statutory privilege, subject to the control of the legislature.[18] The policy or impolicy of a law stating the requirements for attorneys is not a question for the courts to determine, but is a matter for the exclusive consideration of the law-making power.[19] It is not necessary, however, for the legislature to define in precise terms the qualifications for attorneys, for it may leave this question to the determination of the court admitting them.[20]

14. Code Civ. Proc., § 96.

15. Philbrook v. Superior Court, 111 Cal. 31, 43 Pac. 402 (holding that a disbarred attorney may appear for himself).

16. Cohen v. Wright, 22 Cal. 293.

17. Ex parte Galusha, 61 Cal. Dec. 109, 195 Pac. 406; In re Collins, 147 Cal. 8, 81 Pac. 220; Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62.

18. Cohen v. Wright, 22 Cal. 293. In this case the court upheld the legislative requirement of the "test oath" of allegiance.

19. Cohen v. Wright, 22 Cal. 293.

20. Ex parte McManus, 151 Cal. 331, 90 Pac. 702 (upholding a statute providing for the examination of architects by a state board of architecture).

A municipal corporation has no power to regulate the practice of the law. It has no power to pass upon or inquire into the qualifications or character of persons who desire to practice law, nor to say where or in what courts they shall practice.[1] Such regulations cannot be upheld as a proper exercise of the police power, for there is nothing about the practice of the profession of the law which makes the business dangerous to the public. It does not threaten the public health or safety, nor is it demoralizing to the public. On the contrary, it is one of the most honorable and learned professions, and its members are among the most conservative citizens in any community.[2]

§ 8. Jurisdiction to Admit.—In the judicial history of California, various courts have been empowered by the legislature with authority to admit attorneys to practice. The Code of Civil Procedure, as adopted in 1872, provided for admission by the supreme court.[3] An amendment adopted in 1874 allowed county and district courts to admit applicants to practice in their respective courts,[4] but the proviso making this change was stricken out in 1895.[5] In 1905 jurisdiction to admit attorneys was taken from the supreme court and vested in the district court of appeal.[6]

The power to admit persons to practice law is now vested exclusively in the district court of appeal,[7] but the court is expected to act generally on the recommenda-

1. City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674. To the same effect, see, also, Ex parte Johnson, 32 Cal. App. Dec. 218, 190 Pac. 852. As to the power of municipalities to tax attorneys, see supra, § 5.

2. City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674.

3. Code Civ. Proc., §§ 276, 277, as adopted in 1872.

4. Code Civ. Proc., § 276, as amended by Code Amdts. 1873–74, act of March 18, 1874, p. 404.

5. Code Civ. Proc., § 276, as amended by Stats. 1895, p. 56.

6. Code Civ. Proc., § 277, as amended by Stats. 1905, p. 5.

7. Opinion of supreme court denying rehearing of In re Mash, 39 Cal. App. 548, 179 Pac. 897; Danford v. Superior Court, 33 Cal. App. Dec. 168, 193 Pac. 272.

tions of the board of bar examiners.[8] Even the admission of attorneys of other states and countries to practice in all the courts of California is placed wholly within the jurisdiction of the district court of appeal, and the law does not authorize an admission of such attorneys by the supreme court.[9] Since the supreme court has no original jurisdiction to admit attorneys, it will not interfere with the decision of the district court of appeal on questions of fact involved therein, unless the record and proceedings in that court show that an error in law led it to the decision, or that the evidence was wholly insufficient or grossly inadequate. Within this rule, the decision of the district court of appeal as to whether an applicant has a good moral character is a finding upon a question of fact.[10]

§ 9. Jurisdiction to Examine.—An examination of an applicant's qualifications is required in every case where a layman seeks to be admitted as an attorney,[11] and may be required where an attorney from another state seeks to be admitted to practice in California.[12] The Code of Civil Procedure, as adopted in 1872, provided that this examination should be conducted in open court by the justices of the supreme court.[13] This requirement was subsequently relaxed, however, by two amendments. The first, adopted in 1880, allowed the examination to be conducted by the justices sitting or holding one of the departments of the supreme court.[14] The second, adopted in 1895, allowed examination by not less than three of the

8. See infra, §§ 9, 10.

9. In re Mock, 146 Cal. 378, 80 Pac. 64; In re Hovey, 7 Cal. Unrep. 202, 80 Pac. 234 (where an application, pending at the time of the change was transferred to the district court of appeal).

10. Opinion of supreme court, denying rehearing of In re Mash, 89 Cal. App. 548, 179 Pac. 89.

11. Code Civ. Proc., § 276; Ex parte Snelling, 44 Cal. 553.

12. Code Civ. Proc., § 279; Ex parte Snelling, 44 Cal. 553.

13. Code Civ. Proc., § 276.

14. Code Civ. Proc., § 276, as amended by Code Amdts. 1880, p. 55.

supreme court commissioners.[15] In 1905, when jurisdiction to admit attorneys was transferred from the supreme court to the district court of appeal,[16] jurisdiction to examine attorneys was also vested in that court.[17] In 1919, statutory authority was given for a board of bar examiners, and it was provided that an applicant before being admitted to practice must produce a certificate showing that he has satisfactorily passed an examination conducted by such board.[18] This is not to be construed, however, as preventing the district court of appeal from further examining any applicant when deemed proper.[19]

The examination of the applicant's qualifications must not be confused with the testimonials that he has a good moral character and proof that he satisfies the other requisites for admission. Such testimonials and proof are still to be presented to the district court of appeal.[20]

§ 10. Board of Bar Examiners.—The organization and powers of the state board of examiners are declared by section 276a of the Code of Civil Procedure.[1]

By this section, the supreme court is empowered to appoint three competent attorneys to examine applicants for admission as attorneys and counselors at law. Such persons constitute the board of bar examiners. This board holds examinations for admission to the bar of applicants who have regularly filed their applications and paid all necessary fees, upon such subjects, and at such times and places as the supreme court or the board may, by its rules or orders direct, and issues a certificate to each applicant who satisfactorily passes the examination and who satisfies the board as to his moral character.

15. Code Civ. Proc., § 276, as amended by Stats. 1895, p. 56.

16. See supra, § 8.

17. Code Civ. Proc., § 276, as amended by Stats. 1905, p. 5.

18. Code Civ. Proc., § 276, as amended by Stats. 1919, p. 721.

19. Code Civ. Proc., § 276a, adopted by Stats. 1919, p. 721.

20. Code Civ. Proc., § 276, as amended by Stats. 1919, p. 721.

1. This section was adopted by Stats. 1919, p. 721.

In addition to the fees prescribed by law for certificate of admission of attorney or counselor, every applicant for examination pays to the clerk of the district court of appeal to which he presents his application, as a fee for such examination, the sum of fifteen dollars. Such fees are paid into the state treasury to the credit of the bar examinations fund and accounted, settled and charged for, in the same manner as provided by law for other fees collected by said clerk. A bar examinations fund is thus created for the salaries and expenses of the board of bar examiners, which fund is under the control of the supreme court.

No person who is engaged in the teaching of law or who is connected with any law school, either in a teaching or an administrative capacity, is eligible during such employment as a member of the board or in any employment under it. The members of the board hold office during the pleasure of the supreme court, and all vacancies therein are filled by the court.

§ 11. Procedure for Admission.—The statute concerning attorneys and counselors at law regulates with great strictness the method in which attorneys are to be admitted.[2] Under the present statute, every applicant for admission as attorney and counselor must present to the district court of appeal of the appellate district in which he resides satisfactory testimonials of character and proof of study, and before being admitted he must produce a certificate showing that he has satisfactorily passed an examination conducted by the board of bar examiners.[3]

2. Ex parte Snelling, 44 Cal. 553.

3. Code Civ. Proc., § 276, as amended by Stats. 1919, p. 721. In 1917 the legislature repealed sections 280a and 280b of the Code of Civil Procedure, and section 1483 of the Political Code, which provided that the graduates of certain law schools should be entitled to a license to practice law, subject to the right of the chief justice of the supreme court to order an examination as in other cases. Stats. 1917, p. 880 (repealing Code Civ. Proc., § 280a); Stats. 1917, p. 83 (repealing Code Civ. Proc., § 280b); Stats.

Examinations by the board of bar examiners must be in whole or in part written examinations.[4] Where an attorney is to be examined by the court as to his qualifications, his personal appearance in court is required, and without it he will not be admitted, notwithstanding temporary inability to appear due to a physical injury.[5]

Where an application to practice law is opposed for alleged lack of good moral character and the commission of alleged fraudulent acts rendering the applicant unfit for admission to the profession, he is entitled, as to all of the several distinct charges formally preferred against him, to be confronted by the witnesses called to support those charges, and to have their testimony taken directly before, and to cross-examine them in the presence and hearing of, the tribunal which must ultimately pass upon the question whether said charges have been sustained by sufficient proof. Within this rule the finding of a trial court on conflicting evidence in a certain action brought against the applicant is hearsay, and inadmissible in such proceeding.[6]

Upon presentation to the district court of appeal of the evidence of qualifications required by statute, it is provided that the district court of appeal shall admit the applicant as an attorney and counselor to all of the courts of the state of California, and shall direct that an order to that effect be entered upon its records and that a certificate of such admission be given him by the clerk of the court as his license.[7] Upon admission, the applicant

1917, p. 880 (repealing Pol. Code, § 1483). For an interpretation of the former statute relating to Hastings College of the Law, see In re Students of Hastings College of Law, 7 Cal. Unrep. 376, 110 Pac. 341.

4. Code Civ. Proc., § 276a, adopted by Stats. 1919, p. 721.

5. Ex parte Snelling, 44 Cal. 553.

6. In re Wells, 35 Cal. App. 802, 171 Pac. 110.

7. Code Civ. Proc., § 277, as amended Stats. 1919, p. 722.

takes the oath required for attorneys,[8] and signs the roll of attorneys kept by the clerk of court.[9]

§ 12. Eligibility in General.—The Code of Civil Procedure contains the following provision:

"Any citizen or person resident of this state, who has bona fide declared his or her intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the courts of this state."[10]

There is the further requirement, however, that

"Every applicant for admission as an attorney and counselor must present satisfactory testimonials of good moral character, together with satisfactory proof that for at least three years he has diligently and in good faith studied law in such manner, upon such subjects and under such conditions as the supreme court or the board of bar examiners shall have prescribed. Before being admitted he must produce a certificate showing that he has satisfactorily passed an examination conducted by the board of bar examiners."[11]

None but citizens are eligible to practice law,[12] or, more accurately, none but those who are citizens of the United States, or who have bona fide declared their intention to become citizens in the manner required by law may be admitted to practice.[13] It follows that a person of Mon-

8. Code Civ. Proc., § 278: "Every person on his admission must take an oath to support the constitution of the United States and the constitution of the state of California, and to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability. A certificate of such oath must be indorsed upon the license."

9. Code Civ. Proc., § 280.

10. Code Civ. Proc., § 275.

11. Code Civ. Proc., § 276, adopted by Stats. 1919.

12. Cohen v. Wright, 22 Cal. 293.

13. In re Hong Yen Chang, 84 Cal. 163, 24 Pac. 156, construing Code Civ. Proc., § 279, relating to the admission of attorneys from other states. The same construction would obviously apply to Code Civ. Proc., § 275, relating to the original admission of laymen.

golian descent, or other person not eligible to become a citizen, cannot be admitted to practice as an attorney at law.[14] Women are entitled, by law, to be admitted as attorneys and counselors in all the courts of California upon the same terms as men.[15]

§ 13. Good Moral Character.—The possession of a "good moral character" has always been deemed an essential qualification for an attorney,[16] and evidence that such character is possessed is required by the code of applicants for original admission,[17] and of attorneys from other states.[18]

The proposition cannot be sustained that upon an attorney's application for admission the court cannot reject him for want of good moral character, unless it appears that he had been guilty of acts which would be cause for his disbarment or suspension. On his admission on certificate he must produce "satisfactory evidence of good moral character." The burden is on him to do this. In a proceeding to disbar an attorney the burden is on the accuser to prove moral turpitude. The requirement on his admission is to prevent the accrediting of untrustworthy persons as fit to receive the confidence attending upon the relation of attorney and client. The inquiry may extend to his general character as well as to particular acts. It is broader in its scope than that in a disbarment proceeding. The court may receive any evidence which tends to show his character for honesty, integrity and general morality, and may no doubt refuse

14. In re Hong Yen Chang, 84 Cal. 163, 24 Pac. 156 (where motion for admission was denied, although the applicant, a Chinese, produced a certificate of naturalization and of admission to the bar in New York).

15. Foltz v. Hoge, 54 Cal. 28.

16. Cohen v. Wright, 22 Cal. 293. As to pleading and proof where application for admission is challenged on the ground of want of good character, see supra, § 11. As to the effect of a finding as to character, see supra, § 8.

17. Code Civ. Proc., § 276.

18. Code Civ. Proc., § 279.

admission upon proofs that might not establish his guilt of any of the acts declared to be causes for disbarment. To preclude admission, it is, therefore, not necessary to show great depravity of character, but only a want of that sincerity and integrity which the law demands of those who are to be allowed the privilege of practicing law.[19] Thus it has been held that one who obtains credit by concealing material facts from the creditor and who, while endeavoring to practice in the superior court by indirection before he is admitted as an attorney, endeavors to induce witnesses to conceal the truth and to evade the giving of an honest answer, is not a person of that high character which the state intends shall be possessed by those who practice as attorneys in the courts.[20] Want of good moral character is not established, however, by proof that the applicant merely concealed the fact that disbarment proceedings were pending in another state if the applicant in fact thought they would be dismissed, although it would be otherwise if the applicant concealed actual disbarment or conviction of gross misconduct.[1]

§ 14. **Attorneys from Other Jurisdictions.**—The Code of Civil Procedure contains the following provision with reference to the admission of attorneys from other jurisdictions:

"Every citizen of the United States, or person resident of this state, who has, bona fide, declared his intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of a sister state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, and who has been engaged in actual practice in such state or foreign country for a period of at least three years, may

19. In re Wells, 174 Cal. 467, 163 Pac. 657, per Shaw, J.

20. In re Wells, 174 Cal. 467, 163 Pac. 657.

1. In re Hovey, 7 Cal. Unrep. 202, 80 Pac. 234.

be admitted to practice in all the courts of this state, by any district court of appeal, upon the production of his license, and satisfactory evidence that his license has not been revoked and that he is of good moral character, and that he has been so engaged in actual practice in such state or foreign country for a period of at least three years; but the court shall before admitting any such person to practice require an investigation and report by the board of bar examiners as to his moral and other qualifications, unless the court shall otherwise direct in a particular case.'"[2]

Even where the applicant has been admitted to practice in one of the jurisdictions enumerated by the statute, it seems that an examination may be required as to his qualifications.[3] Under the former system whereby the examination was conducted by the court,[4] even an attorney who was licensed to practice in other jurisdictions was required to appear in person before the court if the court, in its discretion, determined that an examination of the applicant should take place.[5]

Appearance by comity.—The power of a court, as a matter of law, to admit an attorney from another state to practice in all the courts of California must be distinguished from the power of a court, as a matter of comity, to permit an attorney from another state

2. Code Civ. Proc., § 279, as amended by Stats. 1919, p. 723. The changes in the statute made by the amendment of 1919 are the provision for investigation and report by the bar examiners and the requirement of a showing that the license has not been revoked. Prior to 1919, the good moral character of the applicant needed only to be established by the assurance of local sponsors. This was justly criticised as a "somewhat lax procedure" in In re Mash, 28 Cal. App. 692, 153 Pac. 961. The court had held, however, that the section meant not only that the applicant should present a "license" showing that he had at a certain time been admitted in another state, but required that the court should be satisfied that he had continued to be a member of the bar of such state, in good standing, up to the time of his application. Case of Lowenthal, 61 Cal. 122.

3. Ex parte Snelling, 44 Cal. 553.

4. See supra, § 9.

5. Ex parte Snelling, 44 Cal. 553.

to present an argument in a pending cause.[6] The former power is now vested exclusively in the district court of appeal,[7] while the latter is still possessed by the supreme court,[8] and, presumably, by the other courts as well.[9] Indeed, where an attorney has been admitted to practice in another state and has been accustomed to practice in California without challenge or question from any quarter, and has been habitually recognized by the courts as a member of the bar, he is in any view a de facto officer of the court, even if no motion and order for his admission has been made, and the validity of his acts as to third persons cannot collaterally be called into question.[10]

§ 15. Effect of Admission.—The Code of Civil Procedure contains the following provision as to the effect of admission as attorney at law:

"Every person admitted to practice by a district court of appeal, either upon examination or otherwise, may practice as an attorney in all of the courts of this state, including the supreme court."[11]

Ordinarily, an attorney licensed to practice in all the courts of a state will, on motion and showing of good character, be admitted to the bar of the various inferior federal courts.[12] An order of the court admitting an attorney to practice is in the nature of a judgment that he possessed the requisite qualifications when the order was made and entered.[13]

6. Matter of Mock, 146 Cal. 378, 80 Pac. 64.

7. See supra, § 8.

8. Matter of Mock, 146 Cal. 378, 80 Pac. 64.

9. See 1 Thornton on Attorneys at Law, p. 24.

10. Garrison v. McGowan, 48 Cal. 592.

11. Code Civ. Proc., § 277.

12. Matter of Danford, 157 Cal. 425, 108 Pac. 322.

13. Case of Lowenthal, 61 Cal. 122 (citing Ex parte Garland, 4 Wall. (U. S.) 378, 18 L. Ed. 370, see, also, Rose's U. S. Notes).

Under the former rule that county and district courts might admit attorneys to practice in their own courts,[14] it was held that a notice of appeal to the California supreme court from a judgment of a superior court, being a paper which must be signed by the attorney of record in that court and a proceeding which must be commenced in that court, need not be signed by one who is an attorney of the supreme court, provided he is an attorney of the superior court and the attorney of record.[15]

§ 16. Setting Aside Order of Admission.—It is clear that the court will be justified in setting aside the order admitting an attorney to practice should it appear that the order was obtained by means of fraudulent artifices or concealment.[16] This may be done on petition of other attorneys,[17] or by the court on its own motion.[18] The fact that the order has already been made admitting the attorney to practice does not convert this into a disbarment proceeding, and the order of admission may be therefore set aside although the pleadings and proof would be insufficient to justify disbarment.[19] Thus the order of admission will be set aside where it appears that the attorney has concealed the fact that he has been disbarred in the state from whence he came,[20] or has concealed from the district court of appeal which admitted

14. See supra, § 8.

15. Beardsley v. Frame, 73 Cal. 634, 15 Pac. 310.

16. In re Wells, 174 Cal. 467, 163 Pac. 657; Case of Lowenthal, 61 Cal. 122 (where the court makes the statement given supra in the text); In re Wells, 36 Cal. App. 785, 172 Pac. 93; In re Mash, 28 Cal. App. 692, 153 Pac. 961 (where the order was that the license to practice be "revoked and canceled").

17. In re Wells, 174 Cal. 467, 163 Pac. 657; In re Mash, 28 Cal. App. 692, 153 Pac. 961; In re Wells, 36 Cal. App. 785, 172 Pac. 93.

18. Case of Lowenthal, 61 Cal. 122.

19. In re Wells, 174 Cal. 467, 163 Pac. 657; In re Wells, 36 Cal. App. 785, 172 Pac. 93.

20. Case of Lowenthal, 61 Cal. 122; In re Clark (No. 7316, March 2, 1881); In re Mash, 28 Cal. App. 692, 153 Pac. 961.

him the fact that he is a resident of another district and that his admission there has been previously opposed,[1] or has concealed his conviction for a crime or for gross misconduct in another state,[2] even although such conviction was not followed by his removal or suspension, but was simply followed by fine or imprisonment, as a contempt.[3] Since an order of admission is a judgment that the attorney then possessed the requisite good character,[4] it has been assumed, in determining whether fraud was practiced by an applicant for admission, that the court would not receive evidence derogatory from the applicant's general good character, even in a proceeding to annul the order of admission.[5] This rule is clearly inapplicable, however, where the applicant's want of good character is the very matter fraudulently concealed at the time of his admission. In such case the court may consider any acts or conduct occurring at any time, provided they have a legal tendency to prove his present character.[6] The supreme court has power to transfer to itself for hearing and determination a proceeding for revoking the admission of an attorney at law which has been heard and decided by the district court of appeal.[7]

III. RELATION TO COURT AND PUBLIC.

§ 17. Status as Officers.—The rule is well established that attorneys are officers of the court, and as such are subject to the control of the court before which they prac-

1. In re Wells, 174 Cal. 467, 163 Pac. 657; In re Wells, 36 Cal. App. 785, 172 Pac. 93.

2. Case of Lowenthal, 61 Cal. 122; In re Mash, 28 Cal. App. 692, 153 Pac. 961.

3. Case of Lowenthal, 61 Cal. 122.

4. See supra, § 15.

5. Case of Lowenthal, 61 Cal. 122.

6. In re Wells, 174 Cal. 467, 163 Pac. 657.

7. In re Wells, 174 Cal. 467, 163 Pac. 657. The same rule applies to proceedings for disbarment. In re McCowan, 175 Cal. 51, 170 Pac. 1100.

tice,[8] including summary investigation of dealings between attorney and client,[9] and disbarment for misconduct.[10] The books are full of decisions in which attorneys are termed officers in this sense.[11] The California courts have called attorneys officers of the court in many cases and with reference to many questions, such as the court's power of disbarment,[12] their power of summary proceeding,[13] the validity of an order of infamy,[14] the presumption of an attorney's authority to appear,[15] the presumption of his authority generally,[16] the respect which he owes the courts,[17] his right to compensation,[18] and the validity of his contract to share fees with a layman.[19] Even an attorney who has not been admitted in California is a de facto officer of the court if he has been admitted in another state and has been accustomed to practice in California.[20]

The rule is clear, however, that attorneys are not to be regarded as "public officers" within the meaning of that term as used in constitutions and statutes.[1] Attorneys do not as such discharge any public function. An

8. Clark v. Willett, 35 Cal. 534; Cohen v. Wright, 22 Cal. 293.

9. See infra, § 79.

10. See infra, § 115 et seq.

11. Cohen v. Wright, 22 Cal. 293.

12. In re Morton, 179 Cal. 510, 177 Pac. 453; In re Treadwell, 67 Cal. 353, 7 Pac. 724; People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

13. Tomsky v. Superior Court, 131 Cal. 620, 63 Pac. 1020.

14. Fletcher v. Daingerfield, 20 Cal. 427.

15. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352; San Francisco Sav. Union v. Long, 123 Cal. 107, 55 Pac. 708; County of San Luis Obispo v. Hendricks, 71 Cal. 242, 11 Pac. 682 (district attorney); Clark v. Willett, 35 Cal. 534.

16. Security Loan & Trust Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257.

17. Matter of Humphrey, 174 Cal. 290, 163 Pac. 60; Matter of Shay, 160 Cal. 399, 117 Pac. 442; Platnauer v. Superior Court, 32 Cal. App. 463, 163 Pac. 237.

18. Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78.

19. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

20. Garrison v. McGowan, 48 Cal. 592.

1. McKannay v. Horton, 151 Cal. 711, 121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661, 91 Pac. 598; Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen v. Wright, 22 Cal. 293; Ex parte Galusha, 61 Cal. Dec. 109, 195 Pac. 406.

attorney's license, like the license of a physician, a druggist, a dentist, or an architect, merely enables him to engage in his private emolument.[2] It has therefore been held that attorneys are not included within a constitutional provision prescribing the only oath which is to be taken by officers and persons executing a public trust.[3]

§ 18. Statutory Duties Generally.—The Code of Civil Procedure contains the following provision as to the duties of attorney at law:

"It is the duty of an attorney and counselor:

1. To support the constitution and laws of the United States and of this state;

2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal or just, except the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest;

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."[4]

2. McKannay v. Horton, 151 Cal. 711, 121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661, 91 Pac. 598.

3. Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen v. Wright, 22 Cal. 293. As to the validity of a legislative requirement for "test oath," see supra, § 9.

4. Code Civ. Proc., § 282. For the discussion of such duties as relate particularly to the relation of the attorney to his client, see infra, § 28 et seq.

Pursuant to the foregoing rules, it is a violation of the duties of an attorney at law to counsel or maintain an action or proceeding which does not appear to him to be legal or just, or to encourage the commencement or continuance of an action or proceeding from any corrupt motive of passion or interest, or to encourage the prosecution and commencement of a criminal accusation by exhibiting documents tending, if genuine, to show the guilt of the accused, and then to assume the defense of the accused without any change of mind as to the genuineness of the documents, or as to the guilt or innocence of the accused.[5] It should be remembered that the statutory provisions prescribing the duties of attorneys are enacted not only in the interest of those who employ attorneys, but also in the interest of the community or public at large. They concern the administration of justice, always a subject of public concernment, and relate to a class of officers of courts in which the people of the state have an abiding interest.[6]

§ 19. Duties to Court.—One of the duties of attorneys enumerated in the code section just quoted is so important as to require separate consideration. This is the duty "to maintain the respect due to the courts of justice and judicial officers."[7] In this connection it should be remembered that attorneys are engaged in the service of the court, assisting it in the exercise of its jurisdiction and in the performance of its functions. They stand in confidential relations toward the court, and in consequence thereof they owe to the court the duty of greater fidelity and respect than are due from other persons.[8] The mem-

5. In re Stephens, 84 Cal. 77, 24 Pac. 46.

6. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

7. Code Civ. Proc., § 282, subd. 2 (see supra, § 18).

8. Matter of Shay, 160 Cal. 399, 117 Pac. 442 (holding that an attorney, unlike a layman, may be punished for contempt not committed in the presence of the court).

bers of the legal profession, should, therefore, above all other members of society, be the first to uphold the dignity of judicial tribunals and to protect them against falling into that disrepute to which they would be hastened if proceedings before them were conducted without order or decorum or the respect due the ministers of the law for the law's sake.[9] Under his oath to maintain the respect due to courts, every attorney stands responsible, not only for his own individual conduct in court, but for every paper, which, knowingly, he presents on behalf of his client.[10] It is a grave breach of professional propriety to include in a brief to the supreme court a groundless charge against the purity of motive of the court below.[11] There can be no question, however, of the legal right of an attorney to prefer charges with the governor in good faith against any judge.[12]

By another provision of the code section under discussion attorneys are forbidden to seek to mislead a judge by artifice.[13] Indeed, it is a misdemeanor for an attorney to consent to any deceit or collusion with intent to deceive the court or any party.[14] Counsel should act in good faith toward the court, and in emergencies not remain silent in order to invite an inadvertence, with a view, if possible, of torturing it into an error.[15]

§ 20. Criticism of Court.—There is a line of authorities which places no limit to the criticism members of the bar may make regarding the capacity, impartiality or integ-

9. Platnauer v. Superior Court, 32 Cal. App. 463, 163 Pac. 237.

10. Lamberson v. Superior Court, 151 Cal. 458, 11 L. R. A. (N. S.) 619, 91 Pac. 100 (holding that the attorney may be guilty of contempt for presenting affidavit of his client containing imputations upon the motives of a judge).

11. Sears v. Starbird, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531. See APPEAL AND ERROR, vol. 2, p. 736.

12. In re Collins, 147 Cal. 8, 81 Pac. 220.

13. Guardianship of Danneker, 67 Cal. 643, 8 Pac. 514 (referring to Code Civ. Proc., § 282, subd. 4. See supra, § 18).

14. Pen. Code, § 160, subd. 1.

15. Dwyer v. California Steam Nav. Co., 1 Cal. Unrep. 442.

rity of the courts, even though it extends to the deliberate publication by an attorney capable of correct reasoning of baseless insinuations against the intelligence and integrity of the highest courts.[16] The better rule, however, and the rule which is followed in California, is that which requires of those who are permitted to enjoy the privilege of practicing law the strictest observance at all times of the principles of truth, honesty and fairness, especially in their criticism of the courts, to the end that the public confidence in the due administration of justice be upheld and the dignity and usefulness of the courts maintained.[17] As an attorney or as a citizen he has the right to criticise the judgments and conduct of the judges in a decent and respectful manner, but no man has a right at any time to degrade and intimidate a public officer, and bring his office into contempt, by the publication of libelous matter imputing to him impeachable offenses; and the fact that the officer is a candidate for re-election does not remove the ban.[18] Consequently, while attorneys have the widest latitude in differing with, and criticising the opinions of, the courts, yet when they resort to misrepresentation and unwarranted assaults upon the courts whose officers they are, they violate their duty and obligation.[19] In harmony with this principle, it has been held a breach of duty for an attorney to procure and instigate a widespread publication in the newspapers of false and malicious charges reflecting on the integrity and official conduct of the judge before whom a case in which he is interested is pending, with a view of improperly influencing

16. Matter of Humphrey, 174 Cal. 290, 163 Pac. 60 (citing State Board of Law Examiners v. Hart, 104 Minn. 88, 15 Ann. Cas. 197, 17 L. R. A. (N. S.) 585, 116 N. W. 212, and note; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637.

17. Matter of Humphrey, 174 Cal. 290, 163 Pac. 60, per Lawlor, J. (citing In re Collins, 147 Cal. 8, 19, 81 Pac. 220; 2 Thornton on Attorneys at Law, c. 29; 2. Ruling Case Law, pp. 1089, 1092).

18. Matter of Humphrey, 174 Cal. 290, 163 Pac. 60 (quoting In re Thatcher, 80 Ohio St. 492, 89 N. E. 39).

19. Matter of Humphrey, 174 Cal. 290, 163 Pac. 60. See APPEAL AND ERROR, vol. 2, p. 736.

or unjustly discrediting the action of said judge in that particular case.[20] So, also, it is highly disrespectful to characterize the action of a court as "opera bouffe" and as "a most covetous and wholly unwarranted usurpation of power."[1]

§ 21. Barratry and Illegal Advertising.—The Penal Code contains the following provisions as to barratry:

"Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months and by fine not exceeding five hundred dollars."[2]

"No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy."[3]

It contains this further provision:

"Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor."[4]

In the absence of any pleading on the subject, and of evidence showing that an assignment was taken with the intent to bring suit, it will not be presumed from the fact that the plaintiff is an attorney and has brought a suit that he has taken the assignment with the criminal intent specified in the section last quoted.[5]

The Penal Code also provides that it is a misdemeanor for anyone to issue an advertisement offering to procure, or to aid in procuring, "any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage or to appear or act as attorney, counsel, or referee

20. In re Collins, 147 Cal. 8, 81 Pac. 220.

1. First Nat. Bank v. Superior Court, 12 Cal. App. 335, 107 Pac. 322.

2. Pen. Code, § 158.

3. Pen. Code, § 159.

4. Pen. Code, § 161.

5. Bulkeley v. Bank of California, 68 Cal. 80, 8 Pac. 643.

in any suit for alimony or divorce, or the severance, dissolution, or annulment of any marriage."[6] It is a violation of this provision for an attorney to advertise in newspapers of general circulation, "Divorce, probate and criminal law my specialties."[7] The code also makes it a misdemeanor for any person other than a regularly licensed attorney to advertise himself as practicing or entitled to practice law in any court of justice.[8]

IV. RELATION TO CLIENT.

Creation.

§ 22. In General.—Except in those cases where an attorney is assigned by the court,[9] the creation of the relation of attorney and client demands a contract, express or implied, between the attorney on the one hand and the client on the other.[10] This contract need not be in writing,[11] but it may be avoided if procured by fraud, undue influence or mistake.[12] Where a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney at law is created prima facie.[13] Nevertheless, preliminary conversations between an attorney and a prospective client, in which the layman states the facts of the case and the attorney states the compensation he will require, do not create the relation of attorney and client when there is no retainer paid and no implied contract to pay for the advice given.[14] It is

6. Pen. Code, § 159a.

7. In re Biaggi, 36 Cal. App. 650, 172 Pac. 1130.

8. Pen. Code, § 161a; see, also, § 164, added in 1921.

9. See infra, § 24.

10. 2 Ruling Case Law, p. 953.

11. Black v. Riley, 20 Cal. App. 199, 128 Pac. 764.

12. Black v. Riley, 20 Cal. App. 199, 128 Pac. 764.

13. Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57 (construing the findings as to employment in order to support a judgment for negligence).

14. Hicks v. Drew, 117 Cal. 305, 49 Pac. 189 (holding that where the prospective client withdraws and employs other attorneys, the attorney consulted is not disquali-

not always easy to separate the services which an attorney may render as such from the services which he may render as a broker or in some other capacity. The capacity in which he acts must be determined by the nature of the service rendered, and the testimony of the attorney on this point is not conclusive.[15] In this connection it must be remembered that the occupation of a lawyer is not confined to appearances for parties in actions in courts of justice. A very large part of the professional work done by them consists in advice given to clients for the general purpose of aiding them in the conduct of their business affairs.[16] To determine whether the relation of attorney and client existed between certain persons, it is proper to ask the attorney as to who paid him for his services.[17]

§ 23. Who may Employ Attorneys.—Anyone who is capable of entering into contractual relations with another may employ an attorney.[18] An agent, if properly authorized, may, of course, employ an attorney on behalf of his principal,[19] and such employment does not create the relation of attorney and client between the attorney and the agent.[20] An attorney has no implied authority to employ assistant counsel,[1] but an agent's authority to

fied from appearing for the adverse party).

15. Gage v. Billings, 12 Cal. App. 688, 108 Pac. 664.

16. In re Soale, 31 Cal. App. 144, 159 Pac. 1065 (holding that an attorney, consulted as to a proposed action and as to business affairs, is acting as counselor although he did not in fact charge his client with a fee). See, also, In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169, holding that an attorney at law who collects money collects it as attorney at law and not as attorney in fact.

17. Baker v. Baker 9 Cal. App. 737, 100 Pac. 892.

18. 1 Thornton on Attorneys at Law, p. 234. Section 2297 of the Civil Code provides: "Any person having capacity to contract may appoint an agent."

19. Garrison v. McGowan, 48 Cal. 592; Porter v. Peckham, 44 Cal. 204; Kelly v. Ning Yung Benev. Assn., 2 Cal. App. 460, 84 Pac. 321.

20. Porter v. Peckham, 44 Cal. 204.

1. See infra, § 52.

employ an attorney may be found in a uniform course of business pursued for a number of years,[2] or may be predicated upon estoppel,[3] or ratification.[4] The employment of an attorney by a private corporation, as well as by an individual, may be shown by its conduct, and the rules under which it may be estopped from disputing liability for its acts, or by which its ratification of its acts may be established, are the same.[5]

The right to employ counsel must be distinguished from the right to contract for the counsel's compensation.[6] Thus it has been held that a guardian ad litem has authority to employ a professional attorney at law to represent the ward in litigation,[7] although he has no authority to determine the attorney's compensation.[8] Similarly, the executor or administrator of the estate of a deceased may employ an attorney,[9] but may not determine his compensation.[10]

§ 24. Assignment by Court.—By statutory provision, the court is authorized to assign an attorney for a person accused of crime who desires and is unable to employ counsel,[11] for a party to a partition suit who dies, becomes insane or otherwise incompetent during the action,[12] for the devisees, legatees or heirs of an estate during the

2. Garrison v. McGowan, 48 Cal. 592.

3. Kelly v. Ning Yung Benev. Assn., 2 Cal. App. 460, 84 Pac. 321.

4. Henshall v. Coburn, 177 Cal. 50, 169 Pac. 1014; Countryman v. California Trona Co., 35 Cal. App. 728, 170 Pac. 1069 (where it is said that this is particularly true where the attorney "has been permitted to continue in the open and active capacity and service of an attorney for the corporation without objection or inquiry as to the existence or terms of his engagement to do so").

5. Kelly v. Ning Yung Benev. Assn., 2 Cal. App. 460, 84 Pac. 321.

6. Estate of Lund, 1 Cof. Prob. Dec. 152. See infra, § 88, for unauthorized contracts for compensation.

7. Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922; Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78. See GUARDIAN AND WARD.

8. See infra, § 88.

9. Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78; Estate of Lund, 1 Cof. Prob. Dec. 152.

10. See infra, § 88.

11. Pen. Code, § 987.

12. Code Civ. Proc., § 763.

contest of a will,[13] and for minors without guardians in proceedings to determine heirship.[14] It is eminently proper that the court should appoint attorneys to guard the interests of absent heirs and legatees.[15] Such attorneys are entitled, not only to a reasonable compensation for their services,[16] but also to considerate treatment. A motion made by their client to vacate their appointment and to discharge them is therefore properly denied, although the client is entitled to the substitution of an attorney of his own choosing.[17] There seems to be no provision of law authorizing the court having jurisdiction of guardianship proceedings to require or direct an attorney to perform legal services for the guardian. An order of the court having jurisdiction of the guardianship for the substitution of an attorney for the guardian, in place of a former attorney, simply makes such attorney the attorney of record, and does not attempt to authorize a contract directly affecting the property of the ward or to require the performance of any legal services.[18] The compensation of attorneys appointed by the court is discussed elsewhere in this article.[19]

Imputation of Notice.

§ 25. In General.—By application of the general rule that the knowledge of an agent is imputed to his principal,[20] there follows the special doctrine that the knowledge of an attorney is imputed to his client.[1] This rule

13. Code Civ. Proc., § 1307.
14. Code Civ. Proc., § 1664.
15. Lee v. Superior Court, 112 Cal. 354, 44 Pac. 666.
16. See infra, § 81.
17. Lee v. Superior Court, 112 Cal. 354, 44 Pac. 666.
18. McKee v. Hunt, 142 Cal. 526, 77 Pac. 1103.
19. See infra § 81.
20. See Agents, vol. 1, pp. 846–854.
1. Atkinson v. Foote, 30 Cal. App. Dec. 412, 186 Pac. 831; Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946; Otis v. Zeiss, 175 Cal. 192, 165 Pac. 524; Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073; Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374; Wat-

rests on the presumption that the attorney will discharge his duty to his principal by communicating all facts connected with the subject matter of his agency.[2] As against third persons, however, this presumption is conclusive, although the attorney has in fact not communicated his information to his client.[3]

By application of the rule under discussion, letters sent to the attorney must be regarded as sent to the client,[4] and a client whose cause has been submitted to arbitration is charged with notice of all errors or misconduct on the part of the arbitrators which were known to his attorney.[5] Again, an assignee is charged with the knowledge of the attorney who has searched the abstracts for himself and the assignor as to the existence of a prior lien.[6] So, also, knowledge of defects of title acquired by the attorney during negotiations for the purchase of land for his client is constructive notice to his client.[7] Notice to one attorney is notice to another attorney who is his copartner.[8] Nevertheless, since the constructive notice to the principal comes from information possessed by the agent, and since the knowledge of the agent is a prerequisite, it follows that where the attorney has no real knowledge, but only

son v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64 (where it is said, citing cases as to agents generally: "All these cases as to an agent apply to an attorney or counsel; for they are a species of agent"); Donald v. Beals, 57 Cal. 399; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Hoogs v. Morse, 31 Cal. 128; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543.

2. Atkinson v. Foote, 30 Cal. App. Dec. 412, 186 Pac. 831; Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Donald v. Beals, 57 Cal. 399; Bierce v. Red Bluff Hotel Co., 31 Cal. 160.

3. See infra, § 26.

4. Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073.

5. Hoogs v. Morse, 31 Cal. 128.

6. Donald v. Beals, 57 Cal. 399.

7. Atkinson v. Foote, 30 Cal. App. Dec. 412, 186 Pac. 831 (where it is said that this constructive notice amounts to more than the notice imputed to subsequent purchasers and mortgagees); Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

8. Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374. See PARTNERSHIPS.

constructive notice imputed to him because of the knowledge of his law partner, the client is not bound thereby.[9]

§ 26. Failure to Communicate Knowledge.—Although the rule imputing notice to the client rests on the presumption that the attorney will communicate the information which he has obtained,[10] the fact that the attorney has not actually communicated his knowledge to his client is immaterial,[11] for as against third persons the presumption that he has done so is conclusive.[12] Where others than the attorney and client are concerned, the presumption that the attorney has discharged his duty to his client in communicating facts of which he has notice is as conclusive as the presumption that the client remembers facts brought home to him personally.[13] Consequently, the facts constituting knowledge, or want of it, on the part of the attorney are proper subjects of proof, and are to be ascertained by testimony as in other cases, but, when ascertained, the constructive notice thereof to the client is conclusive, and cannot be rebutted by showing that the attorney did not in fact impart the information so required.[14] As the reason for this rule, the California court has quoted the statement of Lord Brougham: "Policy and the safety of the public forbid a man to deny knowledge while he is so dealing, as to keep himself ignorant, and yet all the while let his agent know, and himself profit by that knowledge."[15]

9. Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374.

10. See supra, § 25.

11. Atkinson v. Foote, 30 Cal. App. Dec. 412, 186 Pac. 831; Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Bierce v. Red Bluff Hotel Co., 31 Cal. 160.

12. Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Bierce v. Red Bluff Hotel Co., 31 Cal. 160.

13. Bierce v. Red Bluff Hotel Co., 31 Cal. 160, per Rhodes, J.

14. Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374, per Searls, C.

15. Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64, per Thornton, J., quoting Kennedy v. Green,

The fact that the attorney files a notice of appeal from a judgment is conclusive evidence that he had actual knowledge of the entry of the judgment, and such knowledge is, in law, by virtue of the principle under discussion, the knowledge of the client himself, notwithstanding his testimony that he had in fact no knowledge thereof.[16]

§ 27. Knowledge Obtained in Prior Transactions.—The client will ordinarily be charged with constructive notice only when the knowledge of the attorney has been gained in the course of the particular transaction in which he has been employed by that client,[17] for there is abundant authority to the point that notice to an agent to be notice to his principal must be given to him while acting in the course of his employment.[18] As the reason for this rule, it has been said that if a party who employs an attorney for the special purpose of examining an abstract and passing upon the record title is to be charged with notice of all knowledge which the attorney may have previously acquired from other transactions for other parties, it would be very dangerous to employ an attorney at all for any such purpose, and the one whom it would be most dangerous to employ would be the attorney having the most experience and the most extensive practice.[19]

Nevertheless it has been said that the rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such character as he may

3 Mylne & K. 699–719, 40 Eng. Reprint, 266–274.

16. Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946.

17. Otis v. Zeiss, 175 Cal. 192, 165 Pac. 524, per Sloss, J.

18. Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374 (citing many cases). See AGENCY, vol. 1, p. 846.

19. Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374, quoting Mitchell, J., in Trentor v. Pothen, 46 Minn. 298, 24 Am. St. Rep. 225, 49 N. W. 129.

communicate to his principal without breach of professional confidence.[20] Although the California court has conceded that this enlargement of the rule of notice may in a few cases prove salutary, it has said that it is a principle which must be closely guarded to prevent injustice from the difficulty and uncertainty which must attend its application.[1] It seems conceded on all hands, therefore, that clear and satisfactory proof that the knowledge of the former transaction was present in the mind and memory of the agent at the time of the second transaction is necessary in order to bind the principal in such second transaction by constructive notice of the prior information of the agent.[2] The presumption that an attorney retains knowledge arising out of an earlier transaction must depend upon the lapse of time and other circumstances.[3] Thus where the knowledge has been acquired only a short time before in a case which is still being litigated during the transaction in question, the circumstances show that it cannot well have escaped the attention of the attorney, and his client will be bound thereby.[4]

Duties of Attorney.

§ 28. In General.—The duties of an attorney and counselor at law spring from his obligations, and these obligations are defined and limited by law.[5] The following are

20. Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374, quoting the syllabus of "The Distilled Spirits," 11 Wall. (U. S.) 356, 20 L. Ed. 167, see, also, Rose's U. S. Notes.

1. Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 24 L. R. A. 197, 36 Pac. 374, per Searls, C.

2. Otis v. Zeiss, 175 Cal. 192, 165 Pac. 524; Wittenbrock v. Parker, 102 Cal. 93, 41 Am. St. Rep. 172, 36 Pac. 374. See AGENCY, vol. 1, p. 846.

3. Atkinson v. Foote, 30 Cal. App. Dec. 412, 186 Pac. 831 (citing "The Distilled Spirits" Case, 11 Wall. (U. S.) 356, 20 L. Ed. 167; Yerger v. Barz, 56 Iowa, 77, 8 N. W. 769; and Christie v. Sherwood, 113 Cal. 526, 45 Pac. 820).

4. Atkinson v. Foote, 30 Cal. App. Dec. 412, 186 Pac. 831.

5. In re Cowdery, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47.

the principal duties of an attorney and counselor to his client as declared by the Code of Civil Procedure:

"To counsel or maintain such actions, proceedings or defenses as appear to him to be legal or just, except the defense of a person charged with a public offense;

To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client;

Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest;

Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."[6]

The duty of an attorney to "maintain inviolate the confidence" of his client as contained in the section above quoted, is not confined merely to noncommunication of facts learned in the course of professional employment, for the section separately imposes the duty "to preserve the secrets of his client."[7]

The Penal Code contains the following provision:

"Every attorney who, whether as attorney or as counselor, either:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Willfully delays his client's suit with a view to his own gain; or,

3. Willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for;

—Is guilty of a misdemeanor."[8]

§ 29. Requirement of Good Faith.—An attorney's relation to his client is fiduciary in character,[9] and the attorney, when acting for his client, is therefore bound to

6. Code Civ. Proc., § 282, subds. 3, 5, 7, 8. For this section in full, see supra, § 18.

7. In re Soale, 31 Cal. App. 144, 159 Pac. 1065.

8. Pen. Code, § 160. As to barratry and illegal advertising, see supra, § 21.

9. Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 Pac.

uberrima fides, the most scrupulous good faith.[10] The relation between attorney and client has been referred to as a "delicate agency,"[11] and as one which demands of the legal adviser the highest fidelity to the interests of his client.[12] It precludes the attorney from obtaining any personal advantage by abusing the confidence reposed in him by the client.[13] If property is conveyed to an attorney for the benefit of his clients, it is his duty to declare the trust, and the attorney, and those who take title under him with notice, cannot found rights on his failure to do so. Equity would indeed be impotent if a trusted legal adviser could profit by withholding the benefit of his special knowledge and skill, or by giving false counsel during the continuance of a relation in the highest sense confidential and fiduciary.[14]

One of the principal obligations which bind an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client.[15] This obligation is a very high and stringent one. The public is interested in its strict maintenance, for without it there can be no assurance that the duties which devolve upon such officials as ministers of justice will be properly discharged. It is essential to the administration of justice and of the respect which the tribunals for its administration should command that these officers should discharge with the highest fidelity, and with the utmost

265; Matter of Danford, 157 Cal. 425, 108 Pac. 322; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Sanguinetti v. Rossen, 12 Cal. App. 623, 107 Pac. 560.

10. Matter of Danford, 157 Cal. 425, 108 Pac. 322; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Porter v. Peckham, 44 Cal. 204; Valentine v. Stewart, 15 Cal. 387.

11. Valentine v. Stewart, 15 Cal. 387.

12. Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490.

13. Matter of Danford, 157 Cal. 425, 108 Pac. 322; In re Burris, 101 Cal. 624, 36 Pac. 101.

14. Sanguinetti v. Rossen, 12 Cal. App. 623, 107 Pac. 560.

15. In re Cowdery, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47. As to the rule that communications between attorney and client are privileged, see EVIDENCE.

good faith, the responsible duties which devolve on them.[16] It is an attorney's duty to protect his clients in every possible way, and it is a gross violation of that duty to mislead or deceive them.[17]

§ 30. Assumption of Adverse Position.—The rule is well established in California that an attorney may not assume a position adverse to his client,[18] for it is a violation of the duty which an attorney owes his client to assume an attitude antagonistic to him without his knowledge and consent.[19] By virtue of this rule, the attorney is precluded from assuming any relation toward his client which would prevent him from devoting his entire energies to his client's interests, and is likewise precluded from asking his client to assume any relation to him by which their interests might become antagonistic.[20] Again, a receiver will not be permitted to employ as his counsel an attorney who is also representing other parties to the proceeding.[1] It is within the power of the court, if satisfied that the attorney in question acted on one side of the case in a former trial, to prohibit him from acting on the other side in another trial. Failure to prevent such action is reversible error.[2] Even after the professional relation of attorney and client has terminated, the attorney may not represent a party adverse to his former client. Even after the termination of the relation of attorney and client the attorney is under a duty not to accept a retainer from the adverse party, although it is in mere consideration

16. In re Cowdery, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47, quoting Valentine v. Stewart, 15 Cal. 387.

17. Sanguinetti v. Rossen, 12 Cal. App. 623, 107 Pac. 560.

18. Hicks v. Drew, 117 Cal. 305, 49 Pac. 189; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Weidekind v. Tuolumne County Water Co., 74 Cal. 386, 19 Pac. 173; In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169; In re Cowdery, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47; Adams v. Woods, 8 Cal. 306.

19. In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169.

20. Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490.

1. Adams v. Woods, 8 Cal. 306.

2. Weidekind v. Tuolumne County Water Co., 74 Cal. 386, 19 Pac. 173.

of not again being retained by his former client, and the court will restrain such action, although the attorney has been unjustly discharged.[3] Nevertheless, where a merely prospective client, who has consulted the attorney only as to the terms of employment, withdraws and employs other attorneys, such fact does not disqualify the attorney consulted from appearing in the case for the adverse party. If it were otherwise, it would be an easy matter to disqualify all those whom a party neither desires to retain nor to allow the opposing party to retain.[4]

Attorney for personal representatives and heirs.— Whether an attorney, who is attorney for an administrator, may act for one of the heirs as against other heirs, in an adversary proceeding relating to the property of the estate, is a question which depends upon the circumstances of the particular case. Situations can be conceived where it might be improper, as for example, where the administrator is an heir at law. It is not improper, however, where the personal representative is the public administrator,[5] or where the personal representative is an indifferent party to the action between the heirs.[6]

§ 31. Acquirement of Adverse Interest.—Since the relation of attorney and client is fiduciary in nature,[7] it is the rule that the attorney may not assume a position,[8] or acquire an interest, which is adverse to the interest of his

3. Weidekind v. Tuolumne County Water Co., 74 Cal. 386, 19 Pac. 173; In re Cowdery, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47 (holding that a former district attorney may not accept a retainer from a person whom he accused of crime while in office, even in consideration of merely not accepting employment with the prosecution; and reviewing exhaustively the earlier English and American cases on the rule stated in the text. See, also, Pen. Code, § 162, where such action on the part of a former prosecuting attorney is now made a misdemeanor and ground for disbarment).

4. Hicks v. Drew, 117 Cal. 305, 49 Pac. 189.

5. Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766.

6. McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008; Estate of Healy, 137 Cal. 474, 70 Pac. 455.

7. See supra, § 29.

8. See supra, § 30.

client.[9] An attorney violates his duty if he brings his own interests into collision with the interests of his client, for there can be no antagonism between attorney and client as to the matters of the delicate agency which exists between them. The attorney is simply the representative of his client, not his rival or competitor.[10]

By application of the foregoing rule, an attorney at law is forbidden to purchase an interest in the thing in controversy adverse to his client.[11] Accordingly, it has been held that an attorney who does so is a trustee for his client and can be compelled to convey the property purchased to the latter.[12] So, also, it has been held that an attorney at law, who, without instructions to do so from his client, secretly purchases tax titles affecting the client's property, is a mere volunteer, and is not entitled to reimbursement from the client.[13] Where the attorney, on the basis of information obtained as such, buys a note of his client at less than its face value and collects for the full value, the client is entitled to recover the difference between the amount which the attorney paid and the amount which he received, including interest on such difference.[14] Where an attorney learns of a defect in his client's title, it has been suggested that he will not be allowed to purchase it for himself, even after the termination of his professional relation, although it has been held that he may purchase it as agent for another client.[15]

§ 32. Collection of Money.—An attorney employed to collect money owes a duty to himself, to his client, and to

9. McArthur v. Goodwin, 173 Cal. 499, 160 Pac. 679; Learned v. Haley, 34 Cal. 608; Webster v. King, 33 Cal. 348; Valentine v. Stewart, 15 Cal. 387.

10. Valentine v. Stewart, 15 Cal. 387, per Baldwin, J.

11. McArthur v. Goodwin, 173 Cal. 499, 160 Pac. 679 (citing Cunningham v. Jones, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572; Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609, 18 S. W. 907; Webster v. King, 33 Cal. 348).

12. Webster v. King, 33 Cal. 348.

13. McArthur v. Goodwin, 173 Cal. 499, 160 Pac. 679.

14. Andrews v. Wilbur, 5 Cal. Unrep. 144, 41 Pac. 790.

15. Learned v. Haley, 34 Cal. 608.

the person from whom he has collected the money to pay it over as soon as he receives it.[16] This duty is not affected by a contract making the attorney at law an attorney de facto. One who is an attorney at law, and who contracts concerning a matter which may be the subject of litigation, and which is a business in which attorneys at law are much engaged, collects it as attorney at law and not as attorney in fact.[17] The duty is not affected by the illegality of the means used by the attorney. To the maxim, that "no man shall be allowed to found any claim upon his own iniquity," should be added, "no lawyer, when sued for money alleged to have been obtained by him through fraudulent means, should plead his own iniquity as a defense."[18] An attorney collecting the money of his client should not, even with good intentions, enter into a secret arrangement to conceal from his client a knowledge of collections made.[19]

There are authorities which hold that it is the duty of an attorney collecting money to pay it in as soon as he receives it, and that want of a previous demand is no defense to an action brought by the client for such money; and there are others which hold that it is a defense only as to the matter of costs. The reason of the rule requiring a demand is that it would be unjust and inequitable to subject a defendant to litigation without first notifying him of plaintiff's claim so that he might have an opportunity of compliance with it without the annoyance and expense of a suit.[20] There can be no doubt, however, that the want of a demand is no defense where it fully appears that it would have been unavailing, when it would

16. In re Treadwell, 67 Cal. 353, 7 Pac. 724; In re Bar Association v. McClellan, 40 Cal. App. 630, 181 Pac. 231. As to actions for collections generally, see infra, § 78. As to summary proceedings for collections, see infra, § 79.

17. In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169, per Thornton, J.

18. Lillie v. Andrews, 24 Cal. App. 10, 139 Pac. 1081, per Shaw, J.

19. In re Treadwell, 67 Cal. 353, 7 Pac. 724.

20. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836.

not have changed the rights and relations of the parties, and would have been a mere useless and idle ceremony.[1] Consequently, proof of demand is unnecessary when the attorney, in his answer, denies that he received the money sued for as attorney for the plaintiff, and alleges that he received it in his own right, and as his own property, and that the plaintiff has no interest therein.[2]

Dealings With Client.

§ 33. Validity in General.—While there are authorities which hold that all dealings between attorney and client with respect to the subject matter of the litigation are against public policy and void,[3-4] the current of authorities does not go so far,[5] and it is the well-established rule in California that such dealings are valid if shown to be fair in all respects.[6] An attorney is under no actual incapacity to deal with or purchase from his client. All that is required where the relation of confidence exists and where the questioned transaction has a bearing upon that relationship is a clear showing that there has been no abuse of confidence and no advantage taken.[7] Consequently, conveyances from a client to his attorney will be upheld where the trial court finds that adequate consideration has been paid.[8] Furthermore, it must be remembered that there is no authority establishing a rule that

1. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836. See ACTIONS, vol. 1, p. 343.

2. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836. See AGENCY, vol. 1, p. 868.

3-4. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836 (referring to Week's Law of Attorneys, § 268 et seq., and cases there cited).

5. Fisher v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68, 69 Pac. 622, 907; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836.

6. Stieglitz v. Settle, 175 Cal. 131, 165 Pac. 436; Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 Pac. 265; Fisher v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68, 69 Pac. 622, 907; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644.

7. Stieglitz v. Settle, 175 Cal. 131, 165 Pac. 436, per Henshaw, J.

8. Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644.

an attorney cannot purchase from his client what is not in any way the object of his concern as attorney. Under such circumstances he is not the attorney in hac re.[9] Even where it is shown that the attorney has exercised undue influence in a transaction with his client which concerns his professional duty, the transaction is not void, in the extreme sense of that term, but is voidable merely, and the resulting instruments will not be ordered canceled, or recovery on them denied, except upon equitable conditions.[10]

§ 34. Requirement of Good Faith and Information.— While an attorney is not prohibited from having business transactions with his client,[11] yet, inasmuch as the relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are a part of or intimately connected with the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and are set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect.[12] Very little knowledge of human nature is required to convince, that if the law allowed the attorney to deal with the principal as he might with a stranger, these responsible trusts upon which the interests of society so much depend would be turned into means of the grossest fraud and oppression.[13] In all dealings with his client the highest degree of fairness and good faith is required of the attorney, and the

9. Stieglitz v. Settle, 175 Cal. 131, 165 Pac. 436, quoting Montesquieu v. Sandys, 18 Ves. Jr. 302, 34 Eng. Reprint, 331.

10. Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 Pac. 265.

11. See supra, § 33.

12. Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490, per Harrison, J.; Stieglitz v. Settle, 34 Cal. App. Dec. 110, 195 Pac. 705.

13. Valentine v. Stewart, 15 Cal. 387, per Baldwin, J.

courts view all such transactions with suspicion and examine them with the utmost scrutiny.[14] An attorney at law should, it has been said, by a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in him, and he will at all times and under all circumstances be held to the full measure of what he ought to be.[15] If on his own account he has any transaction with his client about the subject of the litigation, he must with respect to such transaction be able to give, and must give, to his client all that reasonable advice against himself that he would have given him against a third person.[16]

§ 35. Presumption of Invalidity.—Since the relation between an attorney and client is fiduciary in character,[17] all transactions between them by which the attorney obtains an advantage over his client are presumptively invalid.[18] It is not necessary for the client to show that there has been any failure on the part of the attorney in the performance of his duties to his client,[19] for the burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised.[20] The attorney must show affirmatively that he

14. United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901; Black v. Riley, 20 Cal. App. 199, 128 Pac. 764.

15. Sanguinetti v. Rossen, 12 Cal. App. 623, 107 Pac. 560.

16. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836 (citing Gibson v. Jeyes, 6 Ves. Jr. 266, 31 Eng. Reprint, 1044).

17. See supra, § 29.

18. Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 Pac. 265; Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981; Lynch v. McDonald, 155 Cal. 704, 102 Pac. 918; United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644. Section 2235 of the Civil Code provides: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

19. Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490.

20. United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901;

gave full and proper advice in the premises, acted with entire fairness throughout the transaction, and took no advantage of his client.[1] A failure to make such proof imposes upon the court the necessity of adjudging the invalidity of the transaction between them.[2] Thus it has been said that the rule applicable to transactions between an attorney and client, such as contracts, sales, gifts, etc., is that the attorney who bargains in a matter of advantage to himself with his client is bound to show that the transaction is fair and equitable; that he fully and faithfully discharged his duties to his client, without misrepresentation or concealment of any fact material to the client; that the client was fully informed of his rights and interests in the subject matter of the transaction and the nature and effect of the contract, sale, gift, etc., and was so placed as to be able to deal with his attorney at arm's-length.[3] Similarly, where the attorney and client buy or sell to each other, it has been said that the attorney must remove the presumption of invalidity by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention and freedom of action by the client, and also, that he gave his client full information and disinterested advice. If all these circumstances are proved, the contract will stand; if not, it will be defeated or set aside.[4] This presumption of invalidity is not limited to the case of attorney and client, but applies, as well, to transactions between principal and agent, trustee and cestui que trust, guardian and ward, parent and child,

Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490.

1. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836. See, also, Lynch v. McDonald, 155 Cal. 704, 102 Pac. 918, holding that the attorney must show good faith affirmatively.

2. Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490.

3. Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644, per Rhodes, J., citing many cases from other jurisdictions.

4. Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981, quoting 2 Pomeroy's Equity Jurisprudence, sec. 390.

and generally to cases where a relation of confidence exists between the parties.[5]

§ 36. Limitations on Presumption.—The presumption that dealings between attorney and client are invalid does not apply to a transaction in which the attorney openly assumes a hostile attitude to his client.[6] This is a very different proposition, however, from the one that "No presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client." Whenever an attorney, for his own benefit, deals with his client, in regard to property that is the subject of his employment, he is in a hostile attitude to his client, but is still bound to the exercise of the utmost good faith toward his client in such transaction, and the burden is upon him to rebut the presumption of undue influence. It is only when he openly assumes a hostile attitude that his transactions with his client will be free from the presumption of undue influence on the part of the attorney.[7]

Again, the presumption of invalidity does not apply to a contract by which the relation is originally created and the compensation of the attorney fixed.[8] An attorney dealing with a person about to become a client as to his contract for payment for services occupies no different position than any other two persons contracting for payment of services.[9] The confidential relation does not exist until such contract is made, and in agreeing upon its terms the parties deal at arm's-length.[10] The pre-

5. Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644. See AGENCY, vol. 1, p. 799; GUARDIAN AND WARD; PARENT AND CHILD; TRUSTS, etc.

6. Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981 (citing Johnson v. Fesemeyer, 3 De Gex & J. 13, 44 Eng. Reprint, 1174); Black v. Riley, 20 Cal. App. 199, 128 Pac. 764.

7. Black v. Riley, 20 Cal. App. 199, 128 Pac. 764 (per Hall, J., holding that a requested instruction to the jury, as quoted in the text, was properly refused).

8. Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981; Black v. Riley, 20 Cal. App. 199, 128 Pac. 764.

9. Black v. Riley, 20 Cal. App. 199, 128 Pac. 764.

10. Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981 (citing El-

sumption is applicable, however, to any transaction thereafter between the parties, touching the subject matter of the employment, by which the attorney gains any advantage over his clients.[11]

While it is generally the presumption, not only that undue influence was exercised, but also that there was no sufficient consideration for a contract between attorney and client, this does not mean that a total want of consideration is presumed.[12]

§ 37. Pleading and Proof.—To raise the defense of undue influence in an action by the attorney on an obligation of the client, it is insufficient merely to plead the existence of the professional relation at the time the obligation arose.[13] An essential element of the rule is, that the attorney, "bargains in a matter of advantage to himself," or, what amounts to the same thing, that the client has suffered injury through the abuse of confidence by the attorney. This fact must be both alleged and proven. It is not enough to show that the relation of attorney and client existed, and that during the existence of the relation the parties entered into a contract, the client being induced thereto by the abuse of confidence by the attorney. If this were so, it would follow either that the contracts of the attorney and client are voidable, like those between a trustee and cestui que trust, which is not true, or that a party is entitled to relief on the ground of fraud, without showing that damage resulted from the fraud, which is contrary to the undoubted principles of law.[14] The mere fact that an attorney secured an option and assignment of corporation stock from his client at

more v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401, 21 L. R. A. 366, 32 N. E. 413).

11. Cooley v. Miller & Lux, 168 Cal. 120, 142 Pac. 83. As to the validity of subsequent contracts for compensation, see infra, § 85.

12. Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 Pac. 265.

13. Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 Pac. 265.

14. Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644.

the price of sixteen thousand dollars, when the real value was eighteen thousand dollars, does not show bad faith or misrepresentation, in the absence of any finding that the client was deceived as to the value.[15] The purchase by an attorney, with his client's consent, of the client's property, sold under various executions, by procuring assignments to himself of the certificates of sale and deeds thereunder must be presumed to have been fair and regular as between the attorney and client, and not to have been in effect a redemption by the client, nor a fraud upon his creditors in the absence of any showing that it was made for the benefit of the client, or was in fraud of his other creditors.[16] When the evidence is conflicting as to the fairness of the attorney in a dealing with his client, the finding of the jury cannot be disturbed.[17]

Termination.

§ 38. Discharge by Client.—It is well settled that a client has a right to discharge his attorney at any time, except where the attorney has an interest in the subject matter of the suit, even though a contingent fee has been agreed upon, or an irrevocable power of attorney given, or the client is indebted to the attorney for services or money advanced.[18] The interest of the client in the successful prosecution or defense of an action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity

15. Bailey v. Security Trust Co., 179 Cal. 540, 177 Pac. 444.

16. Fisher v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68, 69 Pac. 622, 907.

17. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836.

18. Todd v. Superior Court, 181 Cal. 406, 7 A. L. R. 938, 184 Pac. 684 (citing authorities, including Gage v. Atwater, 136 Cal. 170, 68 Pac. 581).

or the judgment or the capacity of the attorney.[19] Whether a discharge was with or without cause bears only on the right of the attorney to compensation.[20] Of course, if an attorney is discharged for justifiable reasons, he cannot maintain an action for the value of his services.[1] It is important to bear in mind in this connection that the question of the negligence of an attorney is presented in two ways: First, on a claim to recover damages, and, second, as a justification for the discharge of the attorney before the completion of the stipulated service. An action cannot be maintained on account of negligence or incompetency unless injury has resulted to the client,[2] but the same negligence may justify and necessitate the discharge of the attorney, to avoid damage.[3] Where there is a manifest conflict of evidence as to whether the attorney abandoned a suit or the client discharged the attorney, a decision of the trial court will not be disturbed on the ground that the evidence was insufficient to sustain an implied finding that the attorney was discharged.[4] An attorney's cause of action for wrongful discharge under a contract by which he is to receive compensation when a third person pays his client, accrues when his client receives the payment and not at the time of his discharge.[5]

§ 39. Withdrawal by Attorney.—The general employment of an attorney to defend a case is an entire con-

19. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581, per Harrison, J. As to the right of a party to substitute attorneys, see infra, §§ 41–43. As to the right to discharge attorneys appointed by the court, see Lee v. Superior Court, 112 Cal. 354, 44 Pac. 666.

20. 1 Thornton on Attorneys at Law, p. 239. As to compensation following discharge, see infra, § 101.

1. Cahill v. Baird, 7 Cal. Unrep. 61, 70 Pac. 1061.

2. Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118. See infra, § 74.

3. Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118.

4. Wheeler v. Turner, 1 Cal. Unrep. 798.

5. Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743.

tract, and if the contract is terminated by his withdrawal from the case without cause, or if he is discharged for justifiable reasons, he cannot maintain an action for the value of his services.[6] Consequently, the jury may be instructed that "when a client employs an attorney for a specific action, that is an entire contract; and if you find that the attorney broke the contract himself, or acted in such a manner as to make the relation of attorney and client no longer possible, you must find that the attorney is not entitled to any compensation."[7] Of course, compensation may be recovered if the attorney withdraws for cause and upon reasonable notice.[8] It seems that an attorney who acts gratuitously for his client may withdraw when he chooses from this voluntary service.[9] Where damages are sought for an attorney's refusal to continue litigation, the pleading must show that the client has actually sustained loss thereby, as through the necessary employment of other attorneys.[10] Even where an attorney withdraws from a case without cause, damages cannot be recovered based upon the fact that the case was lost by the attorneys subsequently employed. Observation teaches that the result of a trial cannot be predicated with any degree of certainty, even though conducted by lawyers possessing marked skill and ability.[11]

6. Cahill v. Baird, 7 Cal. Unrep. 61, 70 Pac. 1061 (citing Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233; Walsh v. Shumway, 65 Ill. 471; McArthur v. Fry, 10 Kan. 233; Moyers v. Graham, 15 Lea (Tenn.), 57).

7. Cahill v. Baird, 7 Cal. Unrep. 61, 70 Pac. 1061.

8. 2 Ruling Case Law, pp. 957, 958.

9. Valentine v. Stewart, 15 Cal. 387.

10. Lane v. Storke, 10 Cal. App. 347, 101 Pac. 937.

11. Lane v. Storke, 10 Cal. App. 347, 101 Pac. 937, relying upon section 3301 of the Civil Code, providing that "no damages can be recovered for a breach of a contract which are not ascertainable both in their nature and origin."

§ 40. Death of Client.—The authority of an attorney necessarily ceases with the death of the client,[12] for no one can act for a dead man.[13] After the death of the client, his attorney therefore becomes a stranger to the proceedings.[14] He has no authority thereafter to take and perfect an appeal,[15] except by virtue of a statute recently adopted;[16] to accept and acknowledge service of a notice of appeal;[17] or to give or receive notice of motions for a new trial on an appeal.[18] Even if the attorney for the deceased is also the executor, his acts after the death of his former client do not bind the estate unless he has been substituted as a party.[19] Although proceedings for an appeal in which the notices have been served upon the attorney of the deceased are ineffective to give the appellate court jurisdiction, nevertheless, since upon the face of the records in the trial court an appeal has been taken, the appellate court will order its dismissal for the purpose of removing such apparent appeal.[20]

The former rule that an attorney has no authority to appeal after the death of his client was modified in 1907

12. Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921; Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225; Estate of Turner, 139 Cal. 85, 72 Pac. 718; Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241.

13. Judson v. Love, 35 Cal. 463, quoting Warren v. Eddy, 13 Abb. Pr. (N. Y.) 28. See AGENCY, vol. 1, p. 703.

14. Judson v. Love, 35 Cal. 463.

15. Sheldon v. Dalton, 57 Cal. 19; Sanchez v. Roach, 5 Cal. 248.

16. See infra, this section.

17. Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921; Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225; Estate of Turner, 139 Cal. 85, 72 Pac. 718; Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241.

18. Judson v. Love, 35 Cal. 463. See, also, Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921 (holding that the attorney has no authority to give a notice of appeal).

19. Judson v. Love, 35 Cal. 463. As to the method and necessity for substitution of the personal representative after the death of a party, see ABATEMENT AND REVIVAL, vol. 1, pp. 61–68.

20. Pedlar v. Stroud, ~~116~~ 116 Cal. 461, 48 Pac. 371.

by the enactment of an amendment to section 941b of the Code of Civil Procedure, providing that

"In the event of the death of any person having at his death a right of appeal the attorney of record representing the decedent in the court at which the judgment was rendered may appeal therefrom at any time before the appointment of an executor or an administrator of the estate of the deceased."

This provision is not applicable, however, where the personal representative is appointed before the filing of the notice of appeal, for the right of the attorney is limited to the period prior to such appointment.[1]

§ 41. Death or Removal of Attorney.—The Code of Civil Procedure contains the following provision:

"When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."[2]

This section means no more than it plainly says, viz., that no proceedings may be had against a party, no judgment or order or other step be taken, until he appoints an attorney, unless the prescribed notice be first given.[3] A good example of what is meant by the term "proceedings" as here used is the dismissal of an action on motion of a party thereto.[4] The mere running of the five-year period, at the expiration of which an action is to be dismissed unless it is brought to trial, is not a "proceeding" within the language of this section, and

1. Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921.

2. Code Civ. Proc., § 286.

3. Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841, per Angellotti, C. J.

4. Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841. To the same effect, see Nicol v. San Francisco, 130 Cal. 288, 62 Pac. 513.

the period is, therefore, not extended by the death of an attorney.[5]

The only object of the notice is to require of a party whose attorney has ceased to act that he appoint a new attorney or appear in the action in person, and where a party serves and files a notice that his attorney has withdrawn from the case, and that he appears in person and without attorney, no notice by the adverse party as provided by the section is essential.[6] Similarly, if a plaintiff appears by attorney at a hearing upon a motion for dismissal and presents an affidavit going to the merits of the motion and fully litigates the whole matter upon its merits; the question of lack of jurisdiction on the part of the court is waived, even though the attorney makes a preliminary objection that the notice contemplated by the statute has not been given.[7]

Death of partner in law firm.—Where a firm of attorneys is employed to conduct litigation, the client contracts for the services of all the members of the firm; and, while perhaps the spirit of such a contract does not require that all the partners shall participate in all the steps of the trial, if in their judgment it is not necessary so to do,[8] still such a contract is one so far for the personal services of all, that, upon the death of one member of the firm, the client may elect to consider the employment as terminated.[9]

5. Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841, reversing the rule declared in Troy Laundry Mach. Co. v. Drivers' Independent Laundry Co., 13 Cal. App. 115, 109 Pac. 36.

6. Unwin v. Barstow San Antonio Oil Co., 36 Cal. App. 508, 172 Pac. 622.

7. Nicol v. San Francisco, 130 Cal. 288, 62 Pac. 513, per Garoutte, J., quoted with approval in McMunn v. Lehrke, 29 Cal. App. 298, 155 Pac. 473.

8. Little v. Caldwell, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107 (citing Eggleston v. Boardman, 37 Mich. 14; Phillips v. Edsall, 127 Ill. 535, 20 N. E. 801).

9. Little v. Caldwell, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107 (citing Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293; McGill's Creditors v. McGill's Admr.,

Substitution of Attorneys.

§ 42. In General.—The matter of change and substitution of attorneys is in California regulated by the Code of Civil Procedure. This code contains the following provision:

"The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."[10]

This section of the code confers upon a party the right to change his attorney,[11] and it is only necessary for the party to prefer his request for such change in order to justify the court in making an order therefor.[12] The change must be made in the manner required by statute, however,[13] and this requires in some cases notice from the client to the attorney,[14] and in every case notice to the adverse party.[15] An attorney who is substituted for another in a cause has no greater rights than his predecessor, nor is his client's position in the case in any way changed by such substitution. He steps into the place of his predecessor, and stands, with reference to the case and to the other party, precisely as did his predecessor, and can repudiate or be relieved from an agreement that had been made by him only to the same

2 Met. (Ky.) 258); Withers v. Little, 56 Cal. 370.

10. Code Civ. Proc., § 284. For Code Civ. Proc., § 285, requiring notice of change, see infra, § 50. For Code Civ. Proc., § 286, requiring notice to appoint a new attorney or to appear in person following the death or removal of an attorney, see supra, § 41.

11. See infra, § 43.

12. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581; Woodbury v. Nevada Southern R. Co., 121 Cal. 165, 53 Pac. 450.

13. See infra, §§ 47, 48.

14. See infra, § 49.

15. See infra, § 50.

extent and in the same manner as could his predecessor.[16]

§ 43. Right of Client.—Whatever may have been the rule in other jurisdictions, the rule must be considered as settled in California, under the provision of the code quoted in the preceding section of this article, that in the absence of any relation of the attorney to the subject matter of the action, other than that arising from his employment, the client has the absolute right to change his attorney at any stage in the action.[17] The right of a client to change his attorney at will is based on necessity, in view both of the delicate and confidential nature of the relation between them and of the evil engendered by friction and distrust.[18] The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right.[19] Consequently, the client may obtain a substitution after the entry of judgment, despite

16. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (holding that a stipulation made by the original attorney, though not filed until after the substitution of the new attorney, is binding upon the latter).

17. Todd v. Superior Court, 181 Cal. 406, 7 A. L. R. 938, 184 Pac. 684; Gill v. Southern Pacific Co., 174 Cal. 84, 161 Pac. 1153; Woodbury v. Nevada Southern R. Co., 121 Cal. 165, 53 Pac. 450; Gage v. Atwater, 136 Cal. 170, 68 Pac. 581 (the leading case, making the statement given in the text); Lee v. Superior Court, 112 Cal. 354, 44 Pac. 666 (holding that an absent heir is entitled to have an attorney of his own choosing substituted for the attorney appointed by the court); McMunn v. Lehrke, 29 Cal. App. 298, 155 Pac. 473. As to the right of the client to discharge his attorney, see supra, § 38.

18. Todd v. Superior Court, 181 Cal. 406, 7 A. L. R. 938, 184 Pac. 684, quoting 2 Ruling Case Law, p. 957.

19. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581, per Harrison, J.

the fact that the attorney is employed on a contingent fee, at least in the absence of proof that the substitution is sought in order to carry out a collusive agreement to deprive the attorney of his claim for compensation.[20] Even where a plaintiff to a suit has conveyed a one-third interest in the property which is the subject matter of the litigation to an agent in order to have him attend to the suit, the plaintiff is not excluded from the conduct of the suit, and may substitute a different attorney for the one selected by his agent.[1]

§ 44. Availability of Mandamus.—Mandamus is the proper proceeding to compel the trial court to substitute an attorney, at the request of a party,[2] for there is no other adequate and unembarrassed remedy.[3] Indeed, peremptory mandate will issue to compel the substitution of the attorney selected by absent heirs and legatees in place of the attorney selected for them by the court. It is eminently proper that the court should appoint attorneys to guard the interests of absent heirs and legatees, but when such persons appoint an attorney of their own selection and petition that he be substituted in place of the attorney appointed by the court, the granting of the order of substitution is imperative, and may be required by peremptory writ of mandate, notwithstanding the attorney appointed by the court has rendered valuable services and is protecting the interests of the petitioners better than the attorney selected by them may do.[4] Nevertheless, it is to be observed that the writ of mandamus cannot be invoked to require a judicial officer to act in a particular way, except it appear by necessary legal deduction from the facts stated that the aggrieved party has been denied a right

20. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581.

1. People v. Norton, 16 Cal. 436.

2. Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670; Lee v. Superior Court, 112 Cal. 354, 44 Pac. 666; People v. Norton, 16 Cal. 436.

3. People v. Norton, 16 Cal. 436.

4. Lee v. Superior Court, 112 Cal. 354, 44 Pac. 666.

which it is the plain legal duty of the officer to grant and without his discretion to refuse.[5] Consequently, where a petition for a writ of mandate for the substitution of attorneys, based upon the application of the client, fails to show that the required notice was given the attorney in writing and within the time required, it will be presumed that the court denied the motion for substitution for the reason that no sufficient notice was given, and the writ of mandate will not be granted.[6] Where, however, the motion for substitution is made not only on the ground that the present attorney is unauthorized but also on the "letters, affidavits, and consent" of the party so moving, it may be shown on a petition for a writ of mandate that the attorney's authority to represent such party had been revoked.[7]

§ 45. Necessity for Substitution.—Where a party appears in court by an attorney at law, such attorney has the exclusive control of the case.[8] If the party for any cause becomes dissatisfied with his attorney, the law points out a remedy. He may move the court for leave to change his attorney.[9] Until the new attorney is substituted, he has no authority to act.[10] Thus it has been held that no attorney, other than the attorney of record, is authorized to sign a notice of motion for a new trial,[11] and that such notices are of no avail, unless the objection thereto has been waived.[12] Such waiver can-

5. Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670. See MANDAMUS.

6. Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670 (setting forth the material statements in the petition held to be insufficient).

7. Todd v. Superior Court, 181 Cal. 406, 7 A. L. R. 938, 184 Pac. 684.

8. See infra, § 60.

9. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797; Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Bonnifield v. Thorp, 71 Fed. 924.

10. McMunn v. Lehrke, 29 Cal. App. 298, 155 Pac. 473.

11. McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732; Prescott v. Salthouse, 53 Cal. 221; Hobbs v. Duff, 43 Cal. 485.

12. McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732.

not be found in the fact that the attorney who signed the motion for a new trial was recognized as the attorney in a former appeal, for an appeal is an independent proceeding.[13]

It should be observed, however, that the code sections relative to the substitution of attorneys have no application to criminal cases in which the defendant has a right to defend in person and with counsel, and formal substitution is, therefore, not required.[14] Again, it may be noted that if a new attorney wishes to appear at the trial as counsel for a party, an order of court is not necessary to enable him to do so. Indeed, it has been pointed out that an order associating a new attorney, rather than substituting the new attorney for the old, is unknown in California practice as prescribed by the Code of Civil Procedure.[15] Still further, service of an order to show cause may be made on an attorney who has repeatedly appeared in the proceedings, although he has not been substituted for the attorneys of record.[16]

§ 46. Appeal by Attorney not of Record.—It has been strongly intimated, though perhaps not decided, that an attorney not of record is competent to take an appeal and to give notice thereof, for the reason that an appeal, like a writ of error, is a new proceeding, and that the party to the action has full power to constitute an attorney to take and prosecute the appeal other than the attorney of record in the court below.[17-18] Nevertheless, an appeal has been dismissed where the notice of appeal

13. McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732.

14. Ex parte Clarke, 62 Cal. 490; People v. Garnett, 9 Cal. App. 194, 98 Pac. 247.

15. Prescott v. Salthouse, 53 Cal. 221. See, also, McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732, where Prescott v. Salthouse, 53 Cal. 221, is stated and construed.

16. Golden Gate etc. Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628 (saying that sections 284 and 285 of the Code of Civil Procedure have no immediate bearing on this question.

17-18. McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732; McDonald v. McConkey, 54 Cal. 143.

was signed by an attorney who was not the attorney of record of the party on whose behalf the appeal was attempted to be taken,[19] and the courts have generally assumed that an attorney cannot take an appeal unless he has been substituted, and have found a waiver of such substitution by the adverse party.[20] Thus it has been held that where the attorney for the respondent joins with the attorney for the appellant in certifying the transcript, he waives the right to object to the competency of the attorney of the appellant to appeal.[1] So, also, where the attorney for the respondent accepts service of the notice of appeal signed by an attorney who has in fact been substituted, he waives his right to object to the fact that notice of substitution has not been given,[2] or that there has in fact been no substitution.[3] Since the code provisions relating to the substitution of attorneys do not apply to a criminal case,[4] a notice of appeal on behalf of a defendant accused of a crime may be signed by an attorney other than the attorney of record.[5] An appeal cannot be dismissed on the ground that the attorney for the appellant is not an attorney of record in the case, but is a member of a firm of attorneys who appeared as attorneys of record in the trial court.[6]

§ 47. Method of Substitution Generally.—While a party to an action has an absolute right to change his at-

19. Prescott v. Salthouse, 53 Cal. 221. In Whittle v. Renner, 55 Cal. 395, the court said: "The Code of Civil Procedure nowhere expressly requires that the notice of appeal must be signed by the attorney of record of the party taking the appeal. We are not, however, disposed to question the correctness of the judgment in Prescott v. Salthouse."

20. Smith v. Smith, 145 Cal. 615, 79 Pac. 275; Livermore v. Webb, 56 Cal. 489; Withers v. Little, 56 Cal. 370; McDonald v. McConkey, 54 Cal. 143.

1. McDonald v. McConkey, 54 Cal. 143.

2. Livermore v. Webb, 56 Cal. 489; Withers v. Little, 56 Cal. 370.

3. Smith v. Smith, 145 Cal. 615, 79 Pac. 275.

4. See supra, § 42.

5. Ex parte Clarke, 62 Cal. 490.

6. Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105.

torney,[7] it is necessary that there be an actual change before the new attorney may act,[8] and such change must be effected in the manner provided in the statute.[9] This requires notice of the application for substitution from the client to the attorney, or vice versa, when the change is made on the application of one or the other,[10] and notice of the change to the adverse party in any case.[11] Nevertheless, the proceeding for substitution is one in which the adverse party has no direct interest.[12] Where there has been no regular substitution of attorneys in the mode pointed out by statute, service of notice on the attorney of record binds the client.[13] After the client discharges his former attorney and thereby severs the professional relation, the former attorney, opposing a motion for substitution, stands before the court as a stranger to the proceeding, and cannot object that the new attorney represents an adverse interest.[14] Whether a request for the substitution of attorneys, made to the trial court, was made by the client, is a question of fact for that court to determine, and its conclusion that the client did make the request will not be reviewed in the appellate court upon the suggestion of the displaced attorney that the trial court did not properly consider the evidence before it.[15] The supreme court, although it has considered an appeal from an order of substitution, has raised the question as to whether such an order is appealable.[16]

7. See supra, § 43.

8. See supra, § 45.

9. McMunn v. Lehrke, 29 Cal. App. 298, 155 Pac. 473.

10. See infra, § 49.

11. See infra, § 50.

12. Gill v. Southern Pacific Co., 174 Cal. 84, 161 Pac. 1153.

13. Roussin v. Stewart, 33 Cal. 208; Grant v. White, 6 Cal. 55.

14. People's Home Bank v. Superior Court, 104 Cal. 649, 43 Am. St. Rep. 147, 29 L. R. A. 844, 38 Pac. 452.

15. Woodbury v. Nevada Southern R. Co., 121 Cal. 165, 53 Pac. 450.

16. Gage v. Atwater, 136 Cal. 170; 68 Pac. 581. The court said: "No objection has been made to the hearing of the appeal herein, and we have considered it as if the

§ 48. Method During Appeal.—A motion to substitute attorneys pending an appeal should be made in the trial court, rather than in the appellate court, for it is eminently fitting that the court which has jurisdiction of the proceedings should determine who is authorized to represent the parties thereto as their attorney. There would be a manifest impropriety for the appellate court to direct a substitution of attorneys, to conduct the litigation in reference to the matters that have not been appealed, and the statute contemplates that the same attorney shall represent the party in both the trial and the appellate courts. If any substitution is to be made, it should be made in the court of original jurisdiction, and, if requisite, the action of that court in the matter can then be properly certified to the appellate court.[17] Where a certified copy of the order of substitution by the trial court has been filed in the appellate court and the appeal of the displaced attorney has been dismissed, the appellate court must grant a motion to substitute the new attorney. Nevertheless, a substitution ordered in one cause by the superior court in one county will not support a stipulation signed by the attorney so substituted in an appeal from a different cause, tried in the superior court of a different county.[18] Upon a motion in the supreme court for a substitution of attorneys for a party to an action, where the motion is resisted by one claiming to be an assignee of the party desiring the substitution, who seeks the substitution of a different attorney, but whose rights as assignee to make such substitution are contested, the court will not inquire into the question as to who is the real party in interest, but will allow the party to the record to change his attorney,

order were appealable. We do not, however, wish our silence upon that question to be taken as indicating any opinion upon the question, or as a precedent to be hereafter relied upon."

17. Per Harrison, Van Fleet and Henshaw, JJ., concurring, in ~~Scott v. Hotchkiss, 115 Cal. 89, 47 Pac. 45.~~ Woodbury v. Nevada Ry. Co., 115 Cal. 89, 46 Pac. 863. (See "Erratum", 1926 Supp. 224)

18. Woodbury v. Nevada Southern R. Co., 120 Cal. 367, 52 Pac. 650.

with leave to the party claiming to be his assignee to appear by his attorney and file briefs, and require that notice of all motions be served upon him.[19]

§ 49. Notice of Application for Change.—Where substitution is asked upon motion of either client or attorney, notice from one to the other is required.[20] This notice must be in writing, must contain a statement of the relief sought, and be given the requisite time before the hearing.[1] The only person who is entitled to notice of the motion for substitution is the attorney first employed. Where a party has obtained a substitution without sufficient notice to the attorney, such attorney may object to the substitution and have the same set aside. So, also, the adverse party, if he learns of such defective notice or want of notice, may perhaps have the order avoided. But there is no authority for the proposition that the party who has obtained the substitution, having chosen another attorney and having procured an order substituting a new attorney in the place of the old, and having proceeded thereupon with his new attorney to make a settlement of the cause with the adverse party, may thereafter ask to have the settlement set aside on the ground that it was not sanctioned by the former attorney and support this claim by showing that the order of substitution was made without due notice to such former attorney. In the absence of fraud, reason and good sense demand the rule that the party who obtained the substitution should be bound by such a contract and the adverse party protected therein.[2] In view

19. Faulkner v. Hendy, 99 Cal. 172, 33 Pac. 899.

20. Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670. See section 284 of the Code of Civil Procedure, quoted supra, § 42, providing that the attorney may be changed by court order, upon the application of either client or attorney, "after notice from one to the other."

1. Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670 (citing section 1005 of the Code of Civil Procedure, where the time for notice is stated).

2. Gill v. Southern Pacific Co., 174 Cal. 84, 161 Pac. 1153, per

of the general principle presuming the validity of judicial proceedings,[3] it will be presumed on appeal that an order of substitution was made on due notice to the displaced attorney, despite the affidavit of such attorney that he did not receive the notice.[4]

§ 50. Notice of Substitution.—The Code of Civil Procedure provides that

"When an attorney is changed, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney."

Pursuant to this provision, it has been said that until written notice of substitution is given the adverse party, the order of substitution is ineffectual.[5] After notice of substitution has been served, it is clearly improper for the attorneys of the adverse party to recognize any other attorneys than those substituted.[6] Where substitution is by consent of client and attorney, the change is complete when the consent is filed with the clerk, although until notice is given to the adverse party he must recognize the former attorney.[7]

The court has interpolated the word "may" into the provision of the code above quoted, providing that until notice is served of substitution upon the adverse party, "he must recognize the former attorney."[8] It has been said that the requirement that notice be served upon the adverse party is for the protection of such party and may be waived by him or his attorney.[9] Such waiver

Shaw, J. For criticism of the decision of the district court of appeal in this case, see 4 Cal. Law Rev. 327-329.

3. See COURTS; JUDGMENTS.

4. Gill v. Southern Pacific Co., 174 Cal. 84, 161 Pac. 1153.

5. Prescott v. Salthouse, 53 Cal. 221.

6. Preston v. Eureka Art. Stone Co., 54 Cal. 198.

7. Withers v. Little, 56 Cal. 370.

8. Livermore v. Webb, 56 Cal. 489.

9. Livermore v. Webb, 56 Cal. 489; Withers v. Little, 56 Cal. 370.

may be found in the acceptance of papers signed by the substituted attorney,[10] for if the attorneys of the adverse party intend to rely upon the want of notice of the substitution, they should return papers signed by the substituted attorneys or refuse to acknowledge the service of them.[11]

V. AUTHORITY.

In General.

§ 51. Introductory.—Since an attorney at law is the agent of his client,[12] the rules of law applicable to principal and agent are in general applicable to the relation of client and attorney. If the attorney acts within the scope of his authority, express or implied, the client is bound; if the attorney exceeds his authority, the client is not bound.[13] It may be observed, however, that an attorney is an officer of the court,[14] and the presumption is that he has acted within the scope of his employment.[15] The sections of this article immediately following discuss the principal questions arising as to the authority of an attorney at law. Reference should be made to an earlier section, however, for cross-references to articles which discuss his authority in particular matters which are omitted from this article.[16]

An attorney may, of course, be specially empowered to do acts which do not fall within the scope of his general authority, and no particular formula of words

10. Livermore v. Webb, 56 Cal. 489 (notice of appeal); Withers v. Little, 56 Cal. 370 (notice of appeal).

11. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581; Livermore v. Webb, 56 Cal. 489.

12. See infra, § 59.

13. 1 Thornton on Attorneys at Law, pp. 351, 352.

14. See supra, § 17.

15. Security Loan and Trust Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257. For the application of this presumption to appearances by the attorney, see infra, § 54; to the institution of suit, see infra, § 63; to stipulations, see infra, § 65; to judgments by consent, see infra, § 70; to appeals, see infra, § 72.

16. See supra, § 1.

is ordinarily required to confer special authority upon an attorney.[17] A letter from the client to the attorney gives to the latter such authority as it appears to give upon its face, and is not limited by the secret intentions of the client, nor communicated either to the attorney or to the persons with whom he dealt.[18]

In harmony with the rule applicable to the testimony of agents generally,[19] it is not error to allow an attorney to testify as to his authority. Indeed, the attorney may be the principal witness as to his authority and the purposes for which it is employed. Where the evidence is conflicting as to the authority of an attorney in a particular matter, the decision of the trial court must be affirmed.[20]

§ 52. Delegation of Authority.—It is a well-established rule that the confidence reposed in counsel is personal and cannot be delegated to another without the client's consent.[1] Thus it has been held in California that an attorney cannot assign a contract for his services and substitute another attorney in his place without the consent of his client, such a contract being special and founded upon personal qualities.[2] This rule is in harmony with the general doctrine of the law of agency that a delegated power cannot be delegated.[3] By application of this rule it has also been held in California that an attorney has no implied authority to render his client liable for the fees of associate counsel.[4] It is usual, where several counsel are employed, to give one the leading control of the case, and the others, of course, must be subordinate. The fact that they occupy the

17. Teich v. San Jose Safe Deposit Bank of Savings, 8 Cal. App. 397, 97 Pac. 167.

18. Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073.

19. See AGENCY, vol. 1, p. 713.

20. Security Loan & Trust Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257.

1. 2 Ruling Case Law, p. 978.

2. Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51.

3. See AGENCY, vol. 1, pp. 725, 726.

4. See infra, § 100.

positions of subalterns does not prevent them from being considered as associate counsel, however.[5] Where the name of the attorney who first appeared in a case is signed at the foot of an answer in connection with the name of other counsel, this is sufficient, for the court is not bound to try the question whether the signature was genuine or was put there by associate counsel without any express authority.[6]

§ 53. Ratification of Unauthorized Acts.—Several California cases have recognized the rule that a client may be bound by the unauthorized act of his attorney on the principle of ratification.[7] Thus it has been held that if an attorney, assuming an authority which he does not have, employs an assistant counsel, the client may be bound by this act by reason of his ratification thereof.[8] The mere silence of the client upon learning that his attorney has employed an assistant counsel, however, will not be held to constitute assent or acquiescence in this act of the attorney so as to amount to a ratification or adoption thereof, where there is no authority in the attorney to engage counsel at the client's expense, and where the attorney has agreed to pay all the expenses of the litigation.[9] While mere silence is insufficient, the fact that the associate attorney has rendered services and that the client has accepted and retained their benefit is sufficient to constitute ratification.[10] A statement made by an assistant counsel in the course of an argument to the jury, in support of the contest of a will, that the contestant would pay all the attorneys' fees in the

5. Adams v. Woods, 8 Cal. 306.

6. Willson v. Cleaveland, 30 Cal. 192.

7. Henshall v. Coburn, 177 Cal. 50, 169 Pac. 1014; Title Ins. & Trust Co. v. California Development Co., 168 Cal. 397, 143 Pac. 723; Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899. As to the ratification of the unauthorized acts of agents generally, see AGENCY, vol. 1, pp. 766 to 787.

8. Henshall v. Coburn, 177 Cal. 50, 169 Pac. 1014.

9. Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899.

10. Henshall v. Coburn, 177 Cal. 50, 169 Pac. 1014.

case, followed by the silence of the contestant, does not estop the contestant from disputing the obligation to pay the fees of the assistant counsel.[11] Neither does the silence of an assistant counsel, following the testimony of his client that his principal counsel is the only lawyer employed by him, prevent such assistant counsel from later claiming compensation.[12]

While ratification is ordinarily equivalent to precedent authority, the code provides that "no unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent."[13] Pursuant to this statutory provision, it has been held that the act of an attorney in taking an unauthorized appeal cannot be ratified by the client after the expiration of the period for appeal.[14]

Appearance for Client.

§ 54. Presumption of Authority.—The rule has been repeatedly affirmed by the California courts that a licensed attorney will be presumed, in the absence of evidence to the contrary, to have authority to appear for any person for whom he professes to act.[15] This

11. Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899.

12. Henshall v. Coburn, 177 Cal. 50, 169 Pac. 1014.

13. Civ. Code, § 2313. For the general application of this provision, see AGENCY, vol. 1, pp. 785–786.

14. Title Ins. & Trust Co. v. California Development Co., 168 Cal. 397, 143 Pac. 723.

15. Title Ins. & Trust Co. v. California Development Co., 168 Cal. 397, 143 Pac. 723; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805; Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352 (citing earlier California cases); Odd Fellows Sav. Bank v. Brander, 124 Cal. 255, 56 Pac. 1109; San Francisco Sav. Union v. Long, 123 Cal. 107, 55 Pac. 708; Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51; Shain v. Forbes, 82 Cal. 577, 23 Pac. 198; Garrison v. McGowan, 48 Cal. 592; People v. Mariposa County, 39 Cal. 683; Clark v. Willett, 35 Cal. 534; Hayes v. Shattuck, 21 Cal. 51; Holmes v. Rogers, 13 Cal. 191; Suydam v. Pitcher, 4 Cal. 280; Walberg v. Underwood, 39 Cal. App. 748, 180 Pac. 55; Thomas v. Fursman, 39 Cal. App. 278, 178 Pac. 870; People v. Western Meat Co., 13 Cal. App. 539, 110 Pac. 338. As to the

is a rule which is founded on reason and sanctioned by the authorities.[16] This confidence in an appearance by an attorney, which underlies all judicial action in this country, rests not only upon a belief in the honor and integrity of the attorney, but upon the fact that he is a sworn officer of the court.[17] There can scarcely be a more gross violation of the duty of an attorney than knowingly and willfully to appear for and represent a party to an action without authority. And it is especially so if the person for whom the unauthorized appearance is made has not been served and does not know that an attempt is being made to obtain a judgment against him.[18] The rule that an adverse party may rely on an appearance of a licensed attorney is especially true where the party has been personally served with summons, and thus brought within the jurisdiction of the court, and no other appearance is made by or for him.[19] The presumption that an appearance is authorized applies even to an appearance entered by an attorney who is not admitted to practice in California if he has been admitted in another state and has been accustomed to practice in California without question.[20] It does not apply, however, to an appearance entered by an attorney for one who is not a party, for it is obvious that an attorney cannot appear for one who is not a party to the proceeding.[1]

right of a party to appear by attorney, see APPEARANCES, ante, p. 1. As to the presumption of an attorney's authority to institute suit, see infra, § 63.

16. People v. Western Meat Co., 13 Cal. App. 539, 110 Pac. 338.

17. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352; San Francisco Sav. Union v. Long, 123 Cal. 107, 55 Pac. 708.

18. San Francisco Sav. Union v. Long, 123 Cal. 107, 55 Pac. 708.

19. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352 (holding that the defendant could not move to dismiss the action because of the plaintiff's failure to return the summons within three years).

20. Garrison v. McGowan, 48 Cal. 592.

1. Reither v. Murdock, 135 Cal. 197, 67 Pac. 784.

§ 55. Rebuttal of Presumption.—Although the appearance of a licensed attorney raises a presumption that he has authority to appear,[2] this presumption is disputable, and where it is clearly shown that the attorney was not authorized to appear, the party whom he assumed to represent can found no rights upon the unauthorized act.[3] In other words, although the authority of an attorney is taken for granted, yet the court can always require evidence of his authorization.[4] This evidence may be called for if the supposed client denies the authority of the attorney,[5] or if the opposite party questions it,[6] provided he does so in the manner required by law.[7] To deny a defendant in a criminal action the right to challenge the authority of an attorney who has appeared for him would be to violate section 13 of article I of the constitution of California, guaranteeing the party accused the right to appear and defend, in person and with counsel.[8]

The burden of proof rests on the party denying the authority of the attorney to sustain his denial by a clear preponderance of the evidence.[9] Consequently, the defeat of the results of a protracted and important litigation by reason of a want of authority in the attorney to represent the unsuccessful litigant can only be brought about upon a showing entirely clear and convincing.[10] Furthermore, it is the rule, that if after an appearance

2. See supra, § 54.

3. Title Ins. & Trust Co. v. California Development Co., 168 Cal. 397, 143 Pac. 723.

4. San Francisco Sav. Union v. Long, 123 Cal. 107, 55 Pac. 708.

5. People v. Mariposa County, 39 Cal. 683; Clark v. Willett, 35 Cal. 534; Turner v. Caruthers, 17 Cal. 431; People v. Western Meat Co., 13 Cal. App. 539, 110 Pac. 338. The client must act with promptness, however, or he will be estopped. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352; Seale v. McLaughlin, 28 Cal. 668.

6. People v. Mariposa County, 39 Cal. 683; Clark v. Willett, 35 Cal. 534.

7. See infra, § 55.

8. People v. Western Meat Co., 13 Cal. App. 539, 110 Pac. 338.

9. People v. Western Meat Co., 13 Cal. App. 539, 110 Pac. 338.

10. Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51 (holding that the showing made was insufficient).

entered judgment be rendered against the defendant and the latter seeks relief against the judgment on the ground of want of authority of the attorney to enter his appearance, it is incumbent upon such party to make out a clear and unmixed case. He is required to show clear merits, to take prompt action, and to establish his right to cogent and strong evidence. There would, indeed, be but little security afforded by judicial proceedings had if a party who had been unsuccessful in litigation could overthrow or defeat them upon mere suggestion of want of authority in his attorney to appear for him, or to conduct the controversy upon his behalf; and it would, from the nature of the case, usually be a work of much difficulty for the opposite party to show the authority, even if it existed.[11]

§ 56. Method of Attacking Presumption. — The presumption that an appearance by an attorney is authorized may be attacked either by the party for whom the attorney purports to appear or by the adverse party.[12] It is not admissible, however, to deny the right of a party to appear by the attorney of record, or to deny that the attorney so appearing has full authority to prosecute the suit, upon a mere suggestion at the bar by the adverse party or his attorney,[13] or upon an affidavit of the attorney of the adverse party based on information and belief.[14] In order to invoke the power of the court to question the authority of an attorney to appear, the opposite party, when he questions the authority of the attorney, must state facts showing, or tending to show, that the attorney did not possess the authority which he exercised. Otherwise the presumption arising from the attorney's license and the fact of his appear-

11. Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51; Garrison v. McGowan, 48 Cal. 592, per Wallace, C. J.

12. See supra, § 55.

13. Turner v. Caruthers, 17 Cal. 431.

14. People v. Mariposa County, 39 Cal. 683.

ance will prevail.[15] In some jurisdictions such facts must be set out by affidavit.[16] Nevertheless, it has been held in California that the issue as to the authority of an attorney to appear and act for a supposed client may be raised by a denial of such authority in the answer, and that where the issue is so raised by the pleadings, it requires affirmative evidence, and not a mere absence of evidence, to justify a finding in support of the attorney's authority.[17] That a party has not authorized his appearance by an attorney may, of course, be shown by such party's affidavits.[18]

§ 57. Effect of Unauthorized Appearance.—The California cases are not entirely consistent as to the effect of an unauthorized appearance. In the earliest cases it was said that an appearance entered by attorney, whether authorized or not, is a good and sufficient appearance to bind the party, except in those cases where fraud has been used, or it is shown that the attorney is unable to respond in damages.[19] Again, it was said that even an unauthorized appearance entered by an attorney gives the court jurisdiction, at least where the party concerned, upon being informed of the appearance, makes no objection and takes no steps to vacate it.[20] In harmony with this early doctrine, it was held that if judgment has been rendered pursuant to an unauthorized appearance, the client cannot show the attorney's want of authority in a suit at law upon the judgment. Courts of law hold the record conclusive, leaving the client to his remedy

15. People v. Mariposa County, 39 Cal. 683.

16. 2 Ruling Case Law, p. 981. This is the method approved by the California court for attacking the presumption of an attorney's authority to institute a suit. See infra, § 63.

17. Reither v. Murdock, 135 Cal. 197, 67 Pac. 784.

18. People v. Western Meat Co., 13 Cal. App. 539, 110 Pac. 338.

19. Holmes v. Rogers, 13 Cal. 191; Suydam v. Pitcher, 4 Cal. 280.

20. Leake v. McLaughlin, 28 Cal 668.

against the attorney for damages, if solvent, or to his remedy in equity, if insolvent.[1]

The later cases seem to make a distinction based on whether or not the party has been served with process. Where the party has been served with process, the fact that an unauthorized appearance has been entered against him does not render a judgment against him void, for a default judgment could have been rendered against him in any case based on the service.[2] On the other hand, if an attorney at law, having no authority to do so, enters the appearance of a defendant in an action without the service of jurisdictional process, and the fact of the want of authority is made to appear, such a proceeding is void as to the defendant whose appearance has been so entered.[3] The fact that an attorney has appeared without authority in a proceeding does not affect a party's right to equitable relief.[4]

Conduct of Litigation.

§ 58. Statutory Provisions.—The Code of Civil Procedure contains the following provision relative to the authority of an attorney in the conduct of litigation:

"An attorney and counselor shall have authority:

1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise;

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment."[5]

1. Carpentier v. City of Oakland, 30 Cal. 439.

2. Fitzgerald v. Fernandez, 71 Cal. 504, 12 Pac. 562.

3. Garrison v. McGowan, 48 Cal. 592.

4. Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232.

5. Code Civ. Proc., § 283.

By this section, authority is conferred upon the attorney in the discharge of his duties and functions which is peculiar to his character as such.[6] In the construction of this provision it has been held that the service and filing of notices of motion for a new trial and proposed bills of exceptions are steps in an action within the meaning of this section.[7] The authority given attorneys under the code section above quoted is not limited by section 1054 of the Code of Civil Procedure, prescribing the length of time which may be granted as an extension for the performance of certain acts under the code.[8] It will not be pretended for a moment, however, that the first subdivision of this provision has any application to a criminal case, for in all cases of felony the defendant must appear and plead in person.[9] The application of the code section above quoted to particular matters is discussed in the subsequent sections of this article in connection with the subject concerned.[10]

§ 59. Judicial Statements of Rule. — The extent to which an attorney may bind his client has been several times considered by the California court, and repeatedly by other courts, both English and American. It is held by all courts, without exception, that in the absence of fraud, the acts of an attorney in the ordinary conduct of a cause will bind his client.[11] The attorney is but the agent of the client for the management and conduct of the cause,[12] and, as such agent, he has authority to bind

6. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

7. Simpson v. Budd, 91 Cal. 488, 27 Pac. 758.

8. Simpson v. Budd, 91 Cal. 488, 27 Pac. 758.

9. Ex parte Clarke, 62 Cal. 490.

10. As to the regulation of stipulations, see infra, § 66. As to authority after judgment, see infra, § 71.

11. Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647.

12. Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922; Knowlton v. MacKenzie, 110 Cal. 183, 42 Pac. 580; Carter v. Green Mountain Gold Min. Co., 83 Cal. 222, 23 Pac. 317; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Clemens v. Gregg, 34 Cal. App. 245, 167 Pac. 294.

his client in all matters pertaining to the conduct and management of the suit.[13] The judgment of counsel is trusted in the management and conduct of a lawsuit. He must decide, in the absence, at all events, of express instructions, whether and how long he will contest, what points he will take and what abandon.[14] It is, of course, the attorney's duty, where he is specially instructed, to follow the instructions of his client, except as to matters of detail.[15] Since it is presumed that an attorney acting for a party to a cause has authority to do all acts necessary or incidental to the proper conduct of the case, the burden of proof rests upon the party denying such authority to sustain the denial by a clear preponderance of the evidence.[16] The authority and duties of an attorney employed by a guardian ad litem to conduct the proceedings in an action by or against an infant are no more restricted than in other cases.[17] While it may be assumed that the attorney has sole control of his client's case, as far as any question of practice and procedure is concerned, yet there can be no question but that a tender of money pending the litigation may be made to the client.[18]

§ 60. Control to Exclusion of Client.—It is the law of California, settled by repeated decisions, that a party must be heard in court through his attorney, where he has one, and that the court has no power or authority of law to recognize anyone in the conduct or disposition of the case except the attorneys of record.[19] In other

13. Knowlton v. MacKenzie, 110 Cal. 183, 42 Pac. 580; Clemens v. Gregg, 34 Cal. App. 245, 167 Pac. 294.

14. Holmes v. Rogers, 13 Cal. 191.

15. Lally v. Kuster, 177 Cal. 783, 171 Pac. 961.

16. People v. Western Meat Co., 13 Cal. App. 539, 110 Pac. 338.

17. Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

18. Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308.

19. Estate of Cowell, 167 Cal. 228, 139 Pac. 84; Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718; Toy v. Haskell, 126 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89 (making the statement given supra in the text); Coonan v. Loewenthal, 129 Cal. 197, [redacted] Pac. 940; Crescent Canal Co. v. Mont-

words, where there is an attorney of record representing a party, the court is not bound to observe or follow the directions of the party himself as to the disposal of the case, made in the absence and without the consent of the attorney.[20] As the reason for this rule, it has been said that a party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and it is indispensable to the decorum of the court and the due and orderly conduct of a cause that such attorney shall have the management and control of the action and his acts go unquestioned by anyone except the party whom he represents. So long as the attorney of a party remains attorney of record, the court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney, the law points out a remedy, for the client may move the court for leave to change his attorney. Until that has been done, the client cannot assume the control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorney. Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary.[1] It may be that good reasons can be urged

gomery, 124 Cal. 134, 56 Pac. 797; Crane v. Crane, 121 Cal. 99, 53 Pac. 433; Wylie v. Sierra Gold Co., 120 Cal. 485, 52 Pac. 809; Mott v. Foster, 45 Cal. 72; Clark v. Willett, 35 Cal. 534; Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164 (the leading case); Turner v. Caruthers, 17 Cal. 431; McMunn v. Lehrke, 29 Cal. App. 298, 155 Pac. 473; Carter v. Holt, 28 Cal. App. 796, 154 Pac. 37 (holding that an attorney who is party may be excluded); Bonnifield v. Thorp, 71 Fed. 924 (stating California rule).

20. Estate of Cowell, 167 Cal. 228, 139 Pac. 84.

1. Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164, per Sanderson, C. J. This reasoning has been quoted, or substantially repeated in Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718, Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797, and Bonnifield v. Thorp, 71 Fed. 924.

in support of the contrary rule, but the rule stated is so firmly settled in California that the courts are not warranted in now departing from it.[2]

§ 61. Acts Exclusively for Attorney.—By application of the rule that a party who appears by attorney is excluded from conducting his case in person,[3] it has been held in California that such a party will not be allowed to present an answer;[4] to stipulate for an extension of time in which to file a statement,[5] or in which to file an answer;[6] to stipulate for dismissal;[7] to stipulate for a judgment in favor of the adverse party;[8] or to withdraw a petition for the distribution of the estate of a deceased.[9] The temporary absence of the attorney from the county at the time the client files a stipulation does not affect the rule, and the stipulation goes for nothing.[10] Mandamus is not available as a remedy to compel the court to dismiss an action upon motion of the client and against the objection of the attorney, for the client has an adequate remedy in a substitution of attorneys.[11] Even the statutory provision that dismissal may be made "by the plaintiff himself"[12] does not alter the rule that the consent must be signed by the attorney of record where there is such an attorney.[13]

2. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718, per Angellotti, J. For criticism of the California rule and statement of the majority rule, see 4 Cal. Law Rev. 327–329.

3. See supra, § 60.

4. Crane v. Crane, 121 Cal. 99, 53 Pac. 433.

5. Mott v. Foster, 45 Cal. 72.

6. Wylie v. Sierra Gold Co., 120 Cal. 485, 52 Pac. 809.

7. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718; Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89; Wylie v. Sierra Gold Co., 120 Cal. 485, 52 Pac. 809; Clark v. Willett, 35 Cal. 534 (construing Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164); Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164.

8. Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797.

9. Estate v. Cowell, 167 Cal. 228, 139 Pac. 84.

10. Mott v. Foster, 45 Cal. 72.

11. Theilman v. Superior Court, 95 Cal. 224, 30 Pac. 193.

12. Code Civ. Proc., § 581, subd. 1.

13. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718.

Nevertheless, it has been held that the client may dismiss an action for divorce against the objection of the attorney whose fees have not been paid.[14] It should also be borne in mind that the question here under consideration relates to the power of a party to control the course of the action in court; therefore, it is to be distinguished from those cases which merely involve the right of a party to compromise, settle and acknowledge satisfaction of the claim on which the action is based, and the effect of such a settlement as a defense to the action.[15] Furthermore, it has been held that the issuing of an execution on a judgment is not such an act as requires the direct agency of the attorney in the case.[16] The matter of venue is also one finally within the control of the client and not that of the attorney.[17]

§ 62. Attorney for One of Several Coparties.—Where there are several defendants to an action, and each appears by his own attorney, the proceedings in the cause on behalf of the defendants must be conducted by their respective attorneys until their authority is revoked, or other attorneys substituted. The attorney for one defendant has no more authority to give a notice for another defendant than he has to accept service of notices or other papers, or enter into stipulations for him, or consent to an order or judgment against him.[18] Accordingly, where an attorney appears expressly for certain defendants, his signatures to pleadings and other papers after that time, as attorney for the defendants, will be construed as limited to those defendants for whom he appeared.[19] Nevertheless, where an attorney for one

14. Theilman v. Superior Court, 95 Cal. 224, 30 Pac. 193.

15. Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89. Thus in Turner v. Caruthers, 17 Cal. 431, the court said: "If a release or other paper had been executed by one of the parties, this might have been pleaded and its legal effect accorded to it."

16. Jones v. Spears, 56 Cal. 163.

17. In re Prather's Estate, 60 Cal. Dec. 70, 191 Pac. 521.

18. Hobbs v. Duff, 43 Cal. 485.

19. Spangel v. Dellinger, 42 Cal. 148.

defendant, who has been associated at the trial with the attorney for other defendants, accepts a notice of motion for a new trial for the other attorney, it will be presumed that he had authority to accept the service, if the question is first raised on appeal.[20] Furthermore, a waiver by an attorney who represents one devisee binds devisees who are represented by other attorneys if it appears that the attorneys for the various devisees acted jointly.[1] Of course, where one of several coparties appears in person for himself and as attorney for the others, his coparties will be bound by his acts in the conduct of the litigation.[2]

Authority in Particular Matters.

§ 63. Institution of Suit.—As a general rule, where a demand is placed in the hands of an attorney for enforcement, he has authority to determine what proceedings he will institute.[3] It is undoubtedly true that in many cases the contract employing an attorney to prosecute an action is to be construed as containing an implied, if not express, direction to the attorney to bring such action without further request on the part of the client. This is not true, however, where the attorney is merely employed to assist the regular attorneys of the client who are to act as senior or leading counsel.[4]

Where a suit is instituted in the name of the plaintiff by an attorney of the court, it is to be presumed, prima facie, that he has authorized the attorney to appear and prosecute.[5] It is therefore not necessary to state in the

20. McCreery v. Everding, 44 Cal. 284.

1. Estate of Ross, 136 Cal. 629, 69 Pac. 430.

2. Odd Fellows' Sav. Bank v. Brander, 124 Cal. 255, 56 Pac. 1109.

3. 2 Ruling Case Law, p. 987.

4. Carter v. Baldwin, 95 Cal. 475, 30 Pac. 595.

5. City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604 (suit by city attorney); County of San Luis Obispo v. Hendricks, 71 Cal. 242, 11 Pac. 682 (suit by district attorney); Heynemann v. Eder, 17 Cal. 433; People's Home Sav. Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329. As to the presumption that an

complaint that the attorney was authorized to bring the action.[6] The attorney for a party is never required to prove his retainer or his instruction to commence a proceeding, unless his authority is directly attacked; and this rule is just as applicable to suits instituted in the name and on behalf of the municipal corporations as to suits by private corporations or natural persons.[7]

That the plaintiff has not authorized his attorney to institute suit is not matter in abatement.[8] The proper mode of procedure, if the suit is not authorized, is for the defendant to move the court upon proper affidavits to dismiss the suit, upon the ground that it is not authorized by those in whose names it is brought. If the attorney, on such a motion and after notice of it, fails to show his authority, the court may dismiss the case.[9] Where the right of an attorney to institute an action and to conduct proceedings therein is not challenged, the adverse party cannot secure the dismissal of the action against the opposition of the attorney by showing that the plaintiff does not desire to maintain the action.[10]

§ 64. Pleadings.—There can be no question, in view of the implied authority of an attorney to conduct litigation,[11] that an attorney has authority to prepare and file the customary or appropriate pleadings on behalf of his client. Indeed, it has been held in California that it is within the authority of the attorney to consent orally to an amendment of the complaint.[12]

There is some confusion in the cases as to the right to introduce a pleading in evidence which has been signed

appearance by attorney is authorized, see supra, § 54 et seq.

6. County of San Luis Obispo v. Hendricks, 71 Cal. 242, 11 Pac. 682.

7. City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

8. Heynemann v. Eder, 17 Cal. 433.

9. Turner v. Caruthers, 17 Cal. 431.

10. Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22.

11. See supra, § 58 et seq.

12. Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940.

by an attorney without first proving that it was pleaded with the knowledge and by the authority of the party.[13] It has been said, on the one hand, that where a suit is brought in the name of and for the benefit of a party by his attorney in fact, thereunto duly authorized, and is being prosecuted with his knowledge and consent, he must be presumed to know these facts and to have assented thereto, and so far as the same is evidence for or against him, to be bound thereby.[14] It has been said, on the other hand, that an attorney who has authority to file a petition appropriate to the procurement of an order of court for letters of administration has authority only to make such allegations therein as the law requires the application to contain, including the value and character of the property but not its description.[15] It has been suggested as the correct rule that it should be presumed, where a pleading is filed by the attorney of the party, that such attorney was acting within his authority, and that the pleading should be regarded as the admission of the party, subject to his right to show that, as a matter of fact, the pleading was not authorized by him.[16]

§ 65. Stipulations Generally.—Whether an attorney has authority to enter into a stipulation obviously depends on whether the matter to which the stipulation relates falls within the authority of the attorney. For instance, pursuant to the rule that an attorney has implied authority to conduct litigation,[17] it is within the authority of the attorney to stipulate that the testimony of a witness in one trial may be admissible in another trial.[18] On the other hand, since an attorney has no

13. Coward v. Clanton, 79 Cal. 23, 21 Pac. 359 (citing Duff v. Duff, 71 Cal. 513, 12 Pac. 570, Kamm v. Bank of California, 74 Cal. 191, and Cook v. Barr, 44 N. Y. 156).

14. Kamm v. Bank of California, 74 Cal. 191, 15 Pac. 765.

15. Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

16. Coward v. Clanton, 79 Cal. 23, 21 Pac. 359.

17. See supra, § 58 et seq.

18. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

general authority to act for his client, his stipulation for a disposition of his client's property cannot bind the client if the attorney had no legal authority to make it.[19] Authority to stipulate for particular matters is discussed in the sections of this article relating to such matters.

As a general rule, a stipulation of the attorney will be presumed to have been authorized by the client, as well in order to uphold the action of the court, as for the protection of the other party to the stipulation.[20] The ground upon which it is held that a client is bound by the stipulation of his attorney in those matters that are not directly connected with the conduct of the trial, or the procedure of the court in which the cause is pending, is the presumption that the client has given authority to his attorney to make such stipulation.[1] When it appears, however, that the adverse party, as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases, and the court ought not to act upon the stipulation, nor can the adverse party claim the right to enforce a judgment rendered by reason thereof.[2]

§ 66. Statute Regulating Stipulations.—A California statute provides that

"An attorney and counselor shall have authority: To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise."[3]

This statute is only declaratory of the common-law rule except in so far as it provides that the "agreement" by

19. Woerner v. Woerner, 171 Cal. 278, 152 Pac. 919.

20. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580; Clemens v. Gregg, 34 Cal. App. 245, 167 Pac. 294. As to the presumption of an attorney's authority generally, see supra, § 51; of authority for an appearance, see supra, § 54.

1. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580.

2. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580; Clemens v. Gregg, 34 Cal. App. 245, 167 Pac. 294.

3. Code Civ. Proc., § 283, subd. 1 (see supra, § 58).

which an attorney may bind his client in any step in the action "shall be filed with the clerk or entered upon the minutes of the court."[4] It would be no misnomer to call the statute a statute of frauds. It declares such agreements null and void unless they are in writing and filed with the clerk, or have been entered on the minutes of the court.[5] It was not intended to enlarge or abridge the authority of the attorney; but only to prescribe the manner of its exercise, by requiring the agreement to be filed with the clerk or entered upon the minutes.[6] The authority of the attorney to bind his client by his mere agreement is, upon the face of the statute, no greater or more effective in facie curiae than elsewhere; and to hold that it is would be not only to add a new provision to the statute itself, but also to let in the mischief against which it was the intention of the statute to shut the door.[7]

The rule that a stipulation must be filed or entered upon the minutes is discussed in detail elsewhere in this work.[8] It may be observed at this point, however, that the rule does not apply to preliminary contracts made prior to the commencement of an action,[9] nor to stipulations which have been executed in whole or in part,[10] nor to stipulations admitted by the party.[11]

4. Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647 (the leading case on the interpretation of this section of the code).

5. Merritt v. Wilcox, 52 Cal. 238; Berkheim v. North British & M. Ins. Co., 38 Cal. 623.

6. Wall v. Mines, 130 Cal. 27, 62 Pac. 386; Reclamation District No. 535 v. Hamilton, 112 Cal. 603, 44 Pac. 1074; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647.

7. Merritt v. Wilcox, 52 Cal. 238.

8. See STIPULATIONS.

9. Ephraim v. Pacific Bank, 149 Cal. 222, 86 Pac. 507.

10. Reclamation District No. 535 v. Hamilton, 112 Cal. 603, 44 Pac. 1074; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Continental Bldg. & Loan Assn. v. Woolf, 12 Cal. App. 725, 108 Pac. 729.

11. Reclamation District No. 535 v. Hamilton, 112 Cal. 603, 44 Pac. 1074; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (citing Reese v. Mahoney, 21 Cal. 305, and Patterson v. Ely, 19 Cal. 28).

§ 67. Compromises.—To what extent and under what circumstances an attorney can compromise and give away the rights or property of his client without express authority is not entirely clear,[12] although the question has frequently arisen, both in England and in this country. In England the decisions are not uniform, and the question does not appear to have been definitely settled, though it has been much discussed in several recent cases, which tend strongly to support the rule which prevails in most of the American courts, denying the authority of an attorney to compromise a pending action, merely by virtue of his retainer, and without the consent of his client.[13] In the United States, the rule, as settled by an almost uniform current of authorities, is that an attorney, by virtue merely of his retainer as such, and without express authority from his client, has not the power to bind the client by the compromise of a pending action.[14] In harmony with the American rule, the California cases hold that the attorney's retainer does not give him an unlimited power to dispose of his client's estate, by way of compromise, against which the latter protests in the presence of his adversary, before the transaction is consummated.[15] Indeed, it has been said categorically that

12. Trope v. Kerns, 83 Cal. 553, 23 Pac. 691.

13. Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647 (citing Swinfen v. Swinfen, 24 Beav. 549, 53 Eng. Reprint, 470, and Swinfen v. Lord Chelmsford, 2 L. T. (N. S.) 406).

14. Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647, per Crockett, J. (citing Holker v. Parker, 7 Cranch (U. S.), 436, 3 L. Ed. 396, see, also, Rose's U. S. Notes, and cases from the courts of several states).

15. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580; Trope v. Kerns, 83 Cal. 553, 23 Pac. 691; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647. The authority of an insurer to defend an action against a reinsurer gives no authority to compromise the claim. Commercial Union Assur. Co. v. American Central Ins. Co., 68 Cal. 430, 9 Pac. 712, citing Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647. Where the matter of a compromise is talked over between the client and his attorney, and the attorney compromises on the very terms to which he supposes his client has assented, the trial court is justified in finding that the client authorized his attorney to compromise as he did. Whether the attorney correctly understood his client is a question which is left in doubt,

an attorney whose employment is restricted to the bringing of a suit to recover certain money has no authority, actual or ostensible, to compromise the claim or receive any money thereon until after suit brought.[16] It is true that the California court has held that a decree entered in pursuance of a compromise agreed upon by the attorney without the knowledge or consent of his client is valid if the decree was entered without fraud and if the attorney is solvent.[17] This decision, while not overruled, has been distinguished on the ground that the client did not expressly object to the compromise,[18] and it has been said that the decisions which go the furthest in maintaining the power on the part of an attorney to compromise a suit admit that, as an abstract proposition, a mere general retainer does not give the power, but go upon the theory that, nothing appearing to the contrary, it will be presumed that the attorney acted with the consent and under the direction of his client.[19]

§ 68. Retraxits, Dismissals and References.—At common law a retraxit must have been the act of the plaintiff appearing in his proper person in court, and not for that purpose by his attorney.[20] In harmony with this rule of the common law, it is held in most jurisdictions that an attorney has no implied authority to enter a retraxit.[1] Nevertheless, the contrary doctrine is upheld in California,[2] and is applied to dismissals on motion of one party

and that being so, the appellate court cannot disturb the order of the court below. Carter v. Allen, 2 Cal. Unrep. 399, 4 Pac. 1064.

16. Ambrose v. McDonald, 53 Cal. 28.

17. Holmes v. Rogers, 13 Cal. 191.

18. Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647.

19. Trope v. Kerns, 83 Cal. 553, 23 Pac. 691.

20. Merritt v. Campbell, 47 Cal. 542.

1. 2 Ruling Case Law, p. 992; notes, 132 Am. St. Rep. 162, 25 L. R. A. (N. S.) 1314.

2. Westbay v. Gray, 116 Cal. 660, 48 Pac. 800 (citing, also, Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164); Merritt v. Campbell, 47 Cal. 542.

by consent of the other,[3] which have the effect in California of an open and voluntary renunciation of the suit in court.[4] The California rule that an attorney has authority to conclude his client's rights by the entry of a retraxit or a dismissal having the same effect is based on another California rule, discussed earlier in this article,[5] by which the attorney has control of litigation to the exclusion of the client.[6]

The general authority of an attorney is clearly sufficient to support a dismissal made by the plaintiff alone, and it therefore need not depend on the assent or special instructions of his client.[7] This rule prevails generally in America, and rests on the fact that such a dismissal relates merely to the remedy and not to the right, since the cause of action is saved.[8]

It seems that an attorney is authorized to consent to a reference in California, for it has been held, as against the objection that a reference was not authorized, that it is sufficient if there is an entry on the minutes reciting that "the parties came by their attorneys, and defendant by his attorney moved the court that the cause be referred."[9]

§ 69. Trial.—A lawyer, when engaged in the trial of a case, is not only vested with the right, but, under his oath as such officer of the court, is charged with the duty of safeguarding the interests of his client in the trial of an issue involving such interests. For this purpose it is his sworn duty in a trial, when the cause requires it, to offer testimony in behalf of his client or in support of his case in accordance with his theory of the case, to object to tes-

3. Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Merritt v. Campbell, 47 Cal. 542.

4. See DISMISSAL, DISCONTINUANCE AND NONSUIT.

5. See supra, §§ 60, 61.

6. Merritt v. Campbell, 47 Cal. 542.

7. McLeran v. McNamara, 55 Cal. 508.

8. 1 Thornton on Attorneys at Law, pp. 458, 459.

9. Bates v Visher, 2 Cal. 355.

timony offered by his adversary, to interrogate witnesses, and to present and argue to the court his objections or points touching the legal propriety or impropriety of the testimony or of particular questions propounded to the witnesses.[10] A party may appear in person or by attorney, but when he appears by attorney the latter, while acting as such, has control and management of the case, even to the exclusion of the client,[11] and his sayings and doings in the presence of the court concerning the trial of the cause are the same as though said and done by the party himself.[12] Thus it has been held that the attorney may stipulate that the testimony of a witness in one trial may be admissible in another trial,[13] and may make admissions in court as to the moral character of his client.[14] Indeed, it is the duty of counsel to make an admission curing an admitted error in the record on appeal.[15] An admission by the attorney of record of the amount due for which judgment is taken, when not done in fraud of the rights of the client, destroys the effect of a denial in the answer.[16] Nevertheless, it is not within the province of authority of an attorney at law employed by a depositary to defend an action brought by the depositor for the destruction of the deposit, to make in pais admissions or statements in respect to the circumstances under which the destruction occurred, which are binding upon the depositary.[17]

§ 70. Consent Judgment or Settlement. — Although there is some inconsistency between the earlier and the later California decisions, it seems to be the present rule

10. Platnauer v. Superior Court, 32 Cal. App. 463, 163 Pac. 237.

11. See supra, §§ 60, 61.

12. Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940.

13. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

14. Gueirolo v. Gueirolo, 129 Cal. 686, 62 Pac. 315.

15. Grand Grove of United Ancient Order of Druids v. Garibaldi Grove, 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486.

16. Taylor v. Randall, 5 Cal. 79.

17. Wilson v. Southern Pacific R. R. Co., 53 Cal. 735.

that an attorney has no implied authority to confess judgment against his client.[18] When he does so without the direction, knowledge or consent of his client, even with the best of motives, the client is not bound, unless he ratifies the act.[19] Of course, in the absence of evidence of fraud or of want of authority, it is presumed that an attorney had authority to consent to the entry of judgment.[20]

In the early California cases, however, it was said that a decree fairly entered by consent of an attorney is as binding upon his client as a decree entered after the most pertinacious resistance.[1] Under this rule, if a client suffers by the unauthorized act of his attorney in entering a judgment by consent, his remedy is against the attorney, and the judgment cannot be disturbed on that account unless fraud or collusion, or the insolvency of the attorney, is shown.[2] It cannot be contended that a decree was rendered by mistake where it was voluntarily agreed to by the party's attorney. The negligence or default of the attorney in such cases is that of his principal. Were the rule otherwise, it would be to the interest of the party that his counsel should mismanage his case.[3]

It is the general rule that an attorney cannot, by virtue of his general authority, bind his client by any act which amounts to a surrender in whole or in part of any substantial right.[4] In harmony with this rule, it has been held in California that an attorney cannot stipulate

18. Pfister v. Wade, 69 Cal. 133, 10 Pac. 369. See, also, Security Loan and Trust Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257, where it was held, on appeal, that the evidence was sufficient to sustain the authority of the attorney to stipulate for the entry of a default judgment.

19. Pfister v. Wade, 69 Cal. 133, 10 Pac. 369.

20. Strand Improvement Co. v. City of Long Beach, 173 Cal. 765, 161 Pac. 975. As to the presumption that an attorney's acts are authorized, see supra, § 51.

1. Holmes v. Rogers, 13 Cal. 191.

2. Sampson v. Ohleyer, 22 Cal. 200 (citing Holmes v. Rogers, 13 Cal. 191; Taylor v. Randall, 5 Cal. 79, and Suydam v. Pitcher, 4 Cal. 280).

3. Holmes v. Rogers, 13 Cal. 191.

4. 2 Ruling Case Law, p. 995.

to pass his client's rights or title to land which is the subject matter of the litigation.[5] Similarly, it primarily rests with the client and not his attorneys to decide whether or not an amount tendered by the adverse party should be accepted in full satisfaction of a claim for money due.[6]

§ 71. After Judgment. — For the purpose of prosecuting or defending an action the authority of an attorney ordinarily terminates with the entry of judgment,[7] except for the purpose of sustaining and enforcing the judgment, or seeking to have it set aside or reversed. When a judgment in the cause has once been entered under the direction of the court, the rights of the client have been finally determined, and the attorney ceases to have any authority to consent to its modification to the prejudice of the client without his consent.[8] Thus, it has been held that the authority of an attorney for one accused of contempt ceases upon the termination of such proceeding and that he has thereafter no authority to enter stipulations binding the accused.[9] Similarly, where the court has adjudged the liability of the client to be less than four thousand dollars, the attorney cannot consent that the liability be increased nearly two thousand dollars merely on the basis of the presumption of authority which exists during the conduct of the trial and prior to the rendition of the judgment.[10] Again, an attorney has no authority, and owes no duty, to buy for his client property sold under an execution.[11]

5. Ryan v. Tomlinson, 31 Cal. 11.

6. Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308. As to an attorney's authority to compromise, see supra, § 67.

7. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580 (citing Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335).

8. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580.

9. Frowley v. Superior Court, 158 Cal. 220, 110 Pac. 817.

10. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580.

11. Fisher v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68, 69 Pac. 622, 907 (citing authorities from other jurisdictions).

The Code of Civil Procedure, however, provides that

"An attorney and counselor shall have authority: . . . to receive money claimed by his client in an action or proceeding . . . after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment."[12]

Under this section it has been held that attorneys employed to bring an action of claim and delivery have implied authority, after judgment for the plaintiff, to receive the property when its return is offered by the sureties on an undertaking executed by the defendants to obtain possession of it pending the action, for the authority of an attorney to receive the proceeds of a judgment is not confined to those cases where a money judgment is rendered.[13] An attorney by virtue of his retainer and general control over a cause in court has the power to bind his client by electing to take goods, rather than to recover their value, and the client cannot affect the matter by a subsequent revocation.[14]

§ 72. **Appeals.**—Where a notice of appeal is signed by an attorney of the court, it is presumed that he had authority to take such action.[15] Unless the appellant himself objects to the prosecution of the appeal, it will not be dismissed at the motion of the respondent upon the ground that it is prosecuted against the will of the appellant.[16] Where an appeal has been taken, and is being prosecuted by the appellant's attorney of record, and while he remains attorney of record, his right to manage and control the action cannot be questioned. Whether, in taking the appeal he has gone beyond or vio-

12. Code Civ. Proc., § 283, subd. 2 (see supra, § 58).

13. Ely v. Liscomb, 24 Cal. App. 224, 140 Pac. 1086.

14. Hart v. Spalding, 1 Cal. 213.

15. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805; Woodbury v. Nevada etc. R. Co., 120 Cal. 367, 52 Pac. 650; Ricketson v. Compton, 23 Cal. 636; In re Meade's Estate, 5 Cal. Unrep. 678, 49 Pac. 5.

16. Woodbury v. Nevada etc. Ry. Co., 120 Cal. 367, 52 Pac. 650.

lated his instructions, is a question between him and his clients, in which the adverse party has no concern and need not interest himself.[17] A motion to dismiss an appeal prosecuted by the attorney of record for a corporation, based on the attorney's want of authority, will not be granted upon conflicting affidavits, for the court will not pass upon the weight or sufficiency of conflicting affidavits for the purpose of determining whether the appellant desires the appeal to be dismissed.[18] Whether or not an attorney is authorized to take an appeal is exclusively a question to be determined by the court to which the appeal is taken. Unless such authority is challenged in the appellate court, the lower court has, therefore, no authority to regard the proceeding as other than a valid appeal.[19] If it is clearly shown that an appeal is unauthorized, the supposed appellant can found no rights thereon.[20]

VI. LIABILITY.

§ 73. Rule as to Negligence. — The law implies a promise on the part of an attorney that he will execute the business intrusted to his professional management with a reasonable degree of care, skill and dispatch,[1] and the attorney is liable for a violation of this obligation,[2] provided damage results therefrom.[3] This liability is only in favor of the client, however, and does not extend to third persons.[4] The attorney is also responsible for all losses resulting from his failure to follow the instructions of his client with reasonable skill and care.[5]

17. Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164.

18. Woodbury v. Nevada etc. Ry. Co., 120 Cal. 367, 52 Pac. 650.

19. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805.

20. Title Ins. & Trust Co. v. California Development Co., 168 Cal. 397, 143 Pac. 723.

1. 2 Ruling Case Law, p. 1012.

2. See, generally, the cases cited, infra, §§ 73–77.

3. See infra, § 74.

4. See infra, § 75.

5. Lally v. Kuster, 177 Cal. 783, 171 Pac. 961.

There is a considerable conflict in the authorities as to the degree of diligence and skill to which an attorney shall be holden and for which the law implies that he contracts with his client. In the English courts there have been cases decided by eminent judges in which the rule is laid down that an attorney is liable only for gross negligence, or for gross ignorance in the conduct of a cause, resulting in a damage to the client.[6] The rule firmly established in this country by the weight of authority is that an attorney is bound to use ordinary skill and care in the course of his professional employment.[7] The true rule of liability, established not only by authority, but founded on reason and justice,[8] is that an attorney is liable to his client for a want of such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise.[9] An attorney may not be liable to his client for negligence, although it is sufficient to constitute grounds for his discharge,[10] or reason for reduction of his compensation.[11]

§ 74. Damage as Essential Element.—The rule is well established in California that there can be no recovery of damages against an attorney because of his negligence if the negligence has caused no damage.[12] To hold an

6. Gambert v. Hart, 44 Cal. 542 (citing English cases).

7. Gambert v. Hart, 44 Cal. 542, per Crockett, J., citing Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Wilson v. Russ, 20 Me. 421.

8. Gambert v. Hart, 44 Cal. 542.

9. Estate of Kruger, 130 Cal. 621, 63 Pac. 31; Gambert v. Hart. 44 Cal. 542 (quoting Shearman & Redfield on Negligence, § 212).

10. Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118 (see supra, § 38).

11. Estate of Kruger, 130 Cal. 621, 63 Pac. 31 (see infra, § 102).

12. Lally v. Kuster, 177 Cal. 783, 171 Pac. 961; Siddall v. Haight, 132 Cal. 320, 64 Pac. 410; Hays v. Ewing, 70 Cal. 127, 11 Pac. 602; Hastings v. Halleck, 13 Cal. 203; Lane v. Storke, 10 Cal. App. 347, 101 Pac. 937 (holding pleading and proof insufficient to show damage); Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118 (pointing out by way of distinction that damage need not exist to justify the client in discharging the attorney. See supra, § 38.)

attorney liable for negligence in failing to set up a good defense, the client must, therefore, show by evidence the existence of facts constituting the defense, and that they were susceptible of proof at the trial by the exercise of proper diligence on the part of the attorney.[13] Where the attorney is sued for negligence in delaying the levy of an execution until after the expiration of the judgment lien, a nonsuit is properly granted if the client fails to show that there was property subject to execution,[14] similarly there can be no claim against an attorney for negligently failing to file a lis pendens, where no one acquires an interest during the pendency of the action.[15] Again, an attorney cannot be held liable for negligence based on failure to take an appeal if the facts stated in the complaint show that the appeal would have been of no avail.[16] It may be observed, however, that the suit of a client against an attorney for damages for neglect in conducting a foreclosure suit, which has been dismissed for want of diligent prosecution by the attorney, is not barred by the failure of the client to appeal from the judgment of dismissal, and the proximate cause of the loss to the client is not the failure to take such appeal, where the attorney in advising the client that in his judgment the appeal would be successful also advised her that even if successful on such appeal, she would ultimately lose the case.[17]

§ 75. Liability Limited to Client.—It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone—that is, to the one

13. Hastings v. Halleck, 13 Cal. 203.

14. Siddall v. Haight, 132 Cal. 320, 64 Pac. 410.

15. Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118.

16. Hays v. Ewing, 70 Cal. 127, 11 Pac. 602.

17. Lally v. Kuster, 177 Cal. 783, 171 Pac. 961.

between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act to the injury of another is liable therefor, without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enter into the transaction, the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity by contract or otherwise, by reason of which the former owes some legal duty to the latter.[18] Consequently, it has been held that a legatee named in a will cannot sue the attorney who drew the will for negligence in failing to exclude the grandchildren of the testator and in having the legatee become one of the subscribing witnesses.[19] This conclusion is not affected by the provision of the code that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."[20] The purpose of this section was to avoid circuity of action and to enable the real party in interest to sue. It has no application in favor of a legatee under a will, excluded by reason of the negligence of the attorney, for the contract between the testator and the attorney is not one made expressly for the benefit of the legatee.[1]

18. Buckley v. Gray, 110 Cal. 339, 52 Am. St. Rep. 188, 31 L. R. A. 862, 42 Pac. 900, per Van Fleet, J. (citing National Sav. Bank of D. C. v. Ward, 100 U. S. 195, 25 L. Ed. 621, and other authorities).

19. Buckley v. Gray, 110 Cal. 339, 52 Am. St. Rep. 188, 31 L. R. A. 862, 42 Pac. 900.

20. Civ. Code, § 1559.

1. Buckley v. Gray, 110 Cal. 339, 52 Am. St. Rep. 188, 31 L. R. A. 862, 42 Pac. 900.

§ 76. What Constitutes Negligence.—Since the question as to what amounts to negligence is one of law for the court,[2] it may be well to notice the California decisions determining what constitutes negligence. It is clearly negligence for an attorney to fail to push a suit in accordance with the instructions of the client,[3] to give his client wrongful advice not to file a lien,[4] to fail to consult the statutes and digest which would have shown him the futility of the course pursued,[5] or to disregard the instructions of his client to push a suit and to allow it to be dismissed for want of prosecution after the statute of limitations has expired.[6] It has been held that an attorney is guilty of negligence in submitting a motion for a new trial without a certified statement to support it, since this statement has for many years been required by statute, adjudications of the courts, and the practice of the profession.[7] So, also, he is negligent in moving for a new trial without presenting the proposed statement and exceptions to the judge for settlement within the period provided by law or incorporating into the statement facts showing a valid excuse for the delay.[8] Negligence of the attorney may be predicated on his obtainal of a new trial without making a motion therefor and without supporting it with an agreed or settled statement, affidavits filed, or a record containing specifications of the grounds upon which the motion was rested.[9] It may be predicated upon his failure to prosecute an appeal within the prescribed time when the judgment is so radically defective that an appeal would have terminated in the virtual defeat of the action.[10] It does not follow,

2. See infra, § 77.

3. Lally v. Kuster, 177 Cal. 783, 171 Pac. 961.

4. Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57.

5. Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60, referring to Timberlake v. Crosby, 81 Me. 249, 16 Atl. 896.

6. Lally v. Kuster, 32 Cal. App. Dec. 697, 192 Pac. 78.

7. Gambert v. Hart, 44 Cal. 542.

8. Estate of Kruger, 130 Cal. 621, 63 Pac. 31.

9. Drais v. Hogan, 50 Cal. 121.

10. Drais v. Hogan, 50 Cal. 121.

because a trial results in a verdict for the client, that there has been no negligence in the attorney, for a case may be negligently conducted even when it is not eventually lost by neglect.[11] No negligence can be predicated, however, on a pleading which is necessary to establish the cause of action, nor on the withdrawal of the attorney from the case.[12] Again, no negligence can be predicated on the fact that the statute of limitations has run against a note which was previously given by the attorney for the testator to one of the legatees.[13]

§ 77. Actions for Negligence.—In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained without stating specially that a retaining fee was paid. Where the averment goes further and shows that the employment was in consideration of certain reasonable fees and rewards, it should also aver payment as distinctly as the performance of any other condition precedent.[14] In an action by a client against an attorney for negligence in conducting the collection of a claim, whereby the claim was lost, the burden is on the client to allege and prove that the claim was turned over to the attorney to collect; that there was a failure to collect; that the failure was due to the culpable neglect of the attorney; and that but for such negligence the debt could or would have been collected. This last point involves the further proof that it was a valid, subsisting debt and that the debtor was solvent.[15] In actions against attorneys for negligence, the rule is well settled that when the facts are ascertained, the question of negligence or want of skill is a question of law for the court, and cannot be established by the opinion evidence of another attorney.[16] Where there is a substan-

11. Bridges v. Paige, 13 Cal. 640.
12. Lane v. Storke, 10 Cal. App. 347, 101 Pac. 937.
13. Wilmot v. Moody, 31 Cal. App. Dec. 1093, 190 Pac. 639.
14. Cavillaud v. Yale, 3 Cal. 108, 50 Am. Dec. 388.
15. Lally v. Kuster, 177 Cal. 783, 171 Pac. 961.
16. Gambert v. Hart, 44 Cal. 542.

tial conflict in the evidence, the judgment of the trial court will not be disturbed on appeal.[17] Where judgment is given in favor of the client because of the attorney's negligence, the findings will be construed to uphold the judgment, and therefore to support the existence of the professional relation of attorney and client.[18] An action based on the negligence of an attorney is barred by the statute of limitations unless commenced within two years from the time of the negligence in question.[19]

§ 78 Actions for Collections.—Attention has already been given to the duty of an attorney to pay to his client moneys collected on the latter's behalf and to the question as to whether or not demand is necessary as a condition precedent to an action thereon.[20] If an attorney who is employed to collect a debt with no authority to accept in payment nothing but money, exceeds his authority and accepts property, the client is at liberty to regard it as a collection and to sue for money had and received; or to regard it as negligence and to sue for damages. The recovery will be the same in either case, but in the latter the attorney has the benefit of the defense that the debt could not have been collected.[1] In an action to recover money received by the defendant while acting as attorney for plaintiffs under a certain contract between himself and plaintiffs, a complaint which shows that the defendant was the attorney for plaintiffs in certain litigation, and that he received as fruit thereof certain

17. Drais v. Hogan, 50 Cal. 121 (whether defendant was intrusted with case or was only to look after outside details); Gambert v. Hart, 44 Cal. 542 (whether defendant was employed as attorney or volunteered as assistant); Wilmot v. Moody, 31 Cal. App. Dec. 1093, 190 Pac. 639.

18. Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57.

19. Hays v. Ewing, 70 Cal. 127, 11 Pac. 602.

20. See supra, § 32.

1. Horn v. Hamilton, 89 Cal. 276, 26 Pac. 833 (holding that the attorney is not prejudiced when the client's complaint is for money had and received and the trial is for damages).

money which he failed to deliver or account for to the plaintiffs, states the contract sufficiently, in the absence of a special demurrer, and a finding as to the terms of the contract is within the issues tendered by the pleadings.[2] An attorney who undertakes to and does prosecute actions for the recovery of land at his own expense in consideration of one-half of whatever interest in the land he may recover, and who fails to recover the land, and dismisses the action upon a compromise for money, is accountable to his client for money received as the result of the stipulations made by him in the litigation, and cannot deduct expenses from the client's share of money received.[3] An action for conversion cannot be maintained against attorneys at law for a sum of money collected by them for a client where, under the facts of the case, the attorneys had the right to retain the possession of the money until it was legally ascertained that a reasonable compensation for their services amounted to a less sum than that collected.[4] In an action by a client to recover from his attorney money collected for him, and retained by the attorney for his services in excess of the reasonable value thereof, a verdict for the client upon conflicting evidence as to the matter in controversy cannot be disturbed on appeal as not supported by the evidence.[5]

§ 79. **Summary Proceedings for Collections.**—In some of the states it is expressly provided by statute that where an attorney has refused, on demand, to pay over money collected by him, he may, on motion of the party aggrieved, be required to do so by an order of the court, and, upon failure, may be suspended for any length of time, in the discretion of the court. In others, the right of the courts to proceed in this summary manner, without

2. McRaven v. Dameron, 82 Cal. 57, 23 Pac. 33.
3. McRaven v. Dameron, 82 Cal. 57, 23 Pac. 33.
4. Pullin v. Allen, 37 Cal. App. 218, 173 Pac. 772.
5. Black v. Riley, 20 Cal. App. 199, 128 Pac. 764.

statutory authority, is recognized and upheld by the decided cases.[6] These proceedings have been upheld as against an attorney, upon the ground that he is an officer of the court,[7] where he has been guilty of misconduct toward his client and at the instance of the client.[8] It is to be noted, however, that the fact that an attorney is an officer of the court does not deprive him of the equal protection of the law nor preclude him from his day in court in an ordinary action where there is no charge of a breach of trust, embezzlement, fraud or professional misconduct.[9] Furthermore, the summary proceeding of ordering money or other property delivered without an action to recover the same, in which issues may be properly framed and a verdict of a jury or findings of a court had after a regular trial, is not a favored one, and can be justified only under peculiar circumstances.[10] It is not an absolute right that the client has to invoke this severe and summary remedy against the attorney, but one always subject to discretion. It is for the court to say when and under what circumstances it will entertain such proceeding against its officers, upon the application of the client, and a refusal to proceed in that way is not the denial of any legal right.[11] Thus, where money has been paid the attorney for legal services, the court may decline to order the attorney to repay a portion, where the attorney has not been guilty of professional misconduct and where the complainant is not the client, but a person with only a contingent interest.[12] Indeed, where

6. In re Tyler, 78 Cal. 307, 12 Am. St. Rep. 55, 20 Pac. 674 (citing In re Paschal, 10 Wall. 483, 19 L. Ed. 992, see, also, Rose's U. S. Notes, and New York cases).

7. ~~Bateman v. Superior Court~~ Brunings v. Townsend, 139 Cal. ~~140~~ 137, 72 Pac. ~~922~~ 919; Cohen v. Wright, 22 Cal. 293.

(See "Erratum", 1926 Supp. 226)

8. ~~Bateman v. Superior Court~~ Brunings v. Townsend, 139 Cal. ~~140~~ 137, 72 Pac. ~~922~~ 919.

9. Tomsky v. Superior Court, 131 Cal. 620, 63 Pac. 1020.

10. ~~Bateman v. Superior Court~~ Brunings v. Townsend, 139 Cal. ~~140~~ 137, 72 Pac. ~~922~~ 919 (citing In re Paschal, 10 Wall. 483, 19 L. Ed. 992, see, also, Rose's U. S. Notes).

11. ~~Bateman v. Superior Court~~ Brunings v. Townsend, 139 Cal. ~~140~~ 137, 72 Pac. ~~922~~ 919, ~~per Henshaw, J.~~

12. Brunings v. Townsend, 139 Cal. 137, 72 Pac. 919.

such an order is granted at the request of the client, it is beyond the jurisdiction of the court to punish the attorney for contempt in failing to comply therewith.[13]

VII. COMPENSATION AND LIENS.

Right of Attorney.

§ 80. Compensation in General.—Under the Roman law in ancient times an advocate could make no charge for his services as such, but at a late period, while no promise to pay was implied from the rendition of the service, yet an express promise to pay was enforceable.[14] In England an attorney can only recover his bill of costs and necessary disbursements. A barrister has no action to recover compensation for his services. The attorney cannot recover damages for a breach of contract. With us it is otherwise. Both the attorney and counselor can maintain an action for a breach of his contract of employment, and recover compensation therefor in damages.[15] The measure and mode of compensation is left to the agreement of the parties, express or implied.[16] Where the contract is express, the amount of the fee is determined by the contract;[17] where it is implied, the attorney is entitled to a reasonable fee.[18] This includes the right to a reasonable retaining fee.[19] The rule that an attorney has a right to compensation is limited by the rule that an attorney representing one party in a negotiation will not be allowed to receive compensation from the adverse party.[20] Although an attorney cannot assign a contract for his services,[1] nevertheless, where the attor-

13. Tomsky v. Superior Court, 131 Cal. 620, 63 Pac. 1020.

14. 2 Ruling Case Law, p. 1031.

15. In re Cowdery, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47.

16. Code Civ. Proc., § 1021 (see infra, § 84).

17. See infra, § 95.

18. See infra, § 96.

19. See infra, § 97.

20. De Celis v. Brunson, 53 Cal. 372.

1. See supra, § 52.

ney has practically completed the services which he promised to render and has practically accomplished the ends he agreed to attain, an assignment of the compensation therefor is substantially the assignment of a debt due, and is valid.[2] Where the client pays money to the attorney generally "on account of fees for legal services," the attorney cannot credit it upon certain disputed items and thereby retain the money and place those items beyond controversy.[3]

§ 81. Attorney Appointed by Court.—An attorney who has been appointed by the court to defend a pauper prisoner cannot recover from the county for his professional services,[4] nor for funds advanced out of his own pocket in conducting the defense.[5] As to a charge for services rendered it has been pointed out that no promise on the part of the county to pay for such services can be implied,[6] and that the court is not authorized to create any charge against the county, except in certain special cases, of which the employment of counsel for parties under indictment is not one.[7] Besides, it is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the court, when not inconsistent with their obligations to others.[8] For compensation for such services they must trust to the possible future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law. The

2. Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51.

3. Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118.

4. Lamont v. Solano County, 49 Cal. 158; Rowe v. Yuba County, 17 Cal. 61.

5. Lamont v. Solano County, 49 Cal. 158.

6. Lamont v. Solano County, 49 Cal. 158.

7. Rowe v. Yuba County, 17 Cal. 61.

8. Lamont v. Solano County, 49 Cal. 158; Rowe v. Yuba County, 17 Cal. 61.

duty imposed in this way may, it is true, be carried to unreasonable length, so as to become exceedingly burdensome; but it is usual for the court to apportion the duty among the different members of the profession practicing before it so as to render it as light upon each as possible.[9] As to a charge for funds advanced for the defense, it has been pointed out that there is no statutory provision requiring an attorney to make advances out of his own pocket in procuring affidavits while conducting the defense of a prisoner. He is simply to give his professional services.[10]

An attorney appointed by the court to represent absent heirs and legatees is entitled to reasonable compensation for his services.[11]

§ 82. Surviving Member of Law Firm.—The option to declare a contract for the employment of a firm of attorneys terminated because of the death of one member of a law firm is with the client, and if he does not do so, but is willing to intrust the survivor with the further management of the litigation in which the firm was employed, the survivor is bound to complete the unfinished contract for the benefit of the partnership, and unless it is otherwise agreed upon between the partners, he is not entitled to compensation from the partnership, or from the estate of the deceased partner for his services in doing so.[12] While it is certainly true, when a professional partnership between attorneys at law is dissolved by the death of one, that the survivor is entitled to his

9. Rowe v. Yuba County, 17 Cal. 61, per Field, C. J.

10. Lamont v. Solano County, 49 Cal. 158.

11. Lee v. Superior Court, 112 Cal. 354, 44 Pac. 666; Estate of Blythe, 1 Cof. Prob. Dec. 115; Leach v. Pierce, 93 Cal. 627, 29 Pac. 235.

12. Little v. Caldwell, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107 (where it is said that this rule applies to commercial partnerships, and where the court cites Denver v. Roane, 99 U. S. 355, 25 L. Ed. 476, see, also, Rose's U. S. Notes, to the effect that it applies also to law firms). As to contracts between the surviving partner and the client, see infra, § 90.

own future earnings, and is not required to make an allowance in the settlement of the partnership accounts for what may be termed the goodwill of the partnership, or for the profits of such future business as may have been given to him by former clients of the firm, still, in regard to unfinished business intrusted to the firm, and which the client permits the surviving partner to complete, such contract of employment, although not capable of assignment, is still to be viewed by a court of equity as an asset of the partnership; and it is none the less an equitable asset when the compensation for such services is entirely contingent upon the final success of the litigation in which the services are to be rendered.[13] Where a firm of attorneys agrees to render legal services and to leave the amount of compensation to the client, the members thereof are bound, even after its dissolution, to render such services on the conditions stated.[14]

Where a law partnership is dissolved, one partner may agree orally to wind up the business and to pay the other partner his share of the fees. Such an agreement is based on good consideration, and is not within the statute of frauds, although not all to be performed within a year.[15]

§ 83. Liens of Attorneys.—In California an attorney has no lien upon a judgment rendered in favor of his client as a compensation for his services.[16] Consequently, where the plaintiff enters satisfaction of a judgment, the attorney has no right to disturb it.[17] Simi-

13. Little v. Caldwell, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107, per De Haven, J.

14. Knight v. Whitmore, 125 Cal. 198, 57 Pac. 891.

15. Osment v. McElrath, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731.

16. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581; Hogan v. Black, 66 Cal. 41, 4 Pac. 943; Russell v. Conway, 11 Cal. 93 (following earlier decisions without stating rule); Mansfield v. Dorland, 2 Cal. 507; Ex parte Kyle, 1 Cal. 331 (the leading case).

17. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581; Hogan v. Black, 66 Cal. 41, 4 Pac. 943; Mansfield v. Dorland, 2 Cal. 507 (the leading case).

larly, where the plaintiff, after assigning his claim to his attorney, accepts a settlement from the defendant, who is without notice of the assignment, the settlement is a good defense to an action on the claim brought by the attorney, and his sole remedy is against his client.[18] In most jurisdictions, an attorney has a lien for his costs upon a judgment recovered by him, which may be enforced by retaining money which has come into the hands of the attorney or by giving notice to the adverse party not to pay the judgment until the amount of the costs be paid. In some cases, when there has been collusion between the parties to cheat the attorney, the court has required the client to satisfy them. But this practice is confined to some fixed and certain amount allowed to an attorney by statute, and is not extended to cases where an attorney or counselor claims a quantum meruit compensation for his services. In California, there is no statute giving costs to attorneys, and they must consequently recover for their services in the ordinary mode.[19] The paucity of the California cases on attorneys' liens, and particularly the entire absence of authority on retaining liens, is remarkable.[20]

Contracts for Stated Compensation.

§ 84. In General.—The California code provides that

"The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties."[1]

Pursuant to this provision, it is the rule that the attorney may have his action to recover the amount agreed upon in the one case, or the value of his services in the

18. Hogan v. Black, 66 Cal. 41, 4 Pac. 943.

19. Ex parte Kyle, 1 Cal. 331, per Bennett, J.

20. For the rules prevailing generally as to attorneys' liens, see 2 Ruling Case Law, pp. 1063–1086; 2 Thornton on Attorneys at Law, pp. 969–1086.

1. Code Civ. Proc., § 1021.

other.[2] Thus an attorney may contract to take a conveyance of land in consideration of the performance of legal services, if the contract is fair and free from fraud.[3] Such a contract is not contra bonos mores.[4] The contract for compensation may be for a fee to be fixed by the client,[5] or for a fee contingent upon success.[6] The contract must not be contrary to public policy,[7] but it is to be observed that a contract of an attorney to endeavor to persuade members of the legislature to pass a certain bill, where compensation is not contingent upon success and where no dishonest, secret or unfair means are used, is not contrary to public policy and is not "lobbying" within the meaning of section 35 of article IV of the state constitution of California.[8] A contract of an attorney to divide fees with a layman is invalid,[9] but where one attorney negotiates a loan through another attorney from the client of the latter, promising to pay him for his services by the assignment of an interest in his own fee, which arrangement was fully understood and agreed to by the client making the loan, the contract to pay for the services of the attorney negotiating the loan is upon sufficient consideration, and is not against good morals or public policy.[10] A contract for the compensation of an attorney may be made by a receipt given by the attorney to the client covering a note which is the subject matter of the litigation, and stating the amount of the compensation, even if the receipt is not signed by the client.[11]

2. Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78.

3. Mahoney v. Bergin, 41 Cal. 423.

4. Ballard v. Carr, 48 Cal. 74.

5. See infra, § 95.

6. See infra, § 91.

7. 2 Ruling Case Law, p. 1041. See Ballard v. Carr, 1 Cal. Unrep. 704, however, holding the client estopped to set up that services were contra bonos mores.

8. Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60.

9. See infra, § 89.

10. Goad v. Hart, 128 Cal. 197, 60 Pac. 761.

11. Lavenson v. Wise, 131 Cal. 369, 63 Pac. 622.

§ 85. Time of Making.—Attention has already been given to the fact that a contract between attorney and client creating the professional relation and fixing the attorney's compensation is not subject to the presumption that dealings between attorney and client are invalid.[12] Some cases lay down the general rule that if the relation of attorney and client has already been created, the law governing such relation requires that the attorney, standing already in a confidential relation to his client, is bound to the exercise of the utmost good faith in the matter of making a formal contract for his fees, and hence is precluded from the recovery of more than a reasonable sum for any services rendered or to be rendered under and by virtue of his written agreement without regard to its attempted fixation of their value. An examination of the cases cited in support of this rule, however, shows that the equitable principle it embodies, however sound in the abstract, is not to be given universal application to every agreement made between attorney and client while the relation exists, but only to those agreements where the circumstances under which they are entered into disclose some special reason for its application—as where the written contract provides for greater compensation than was either expressly or impliedly agreed upon prior to the existence of the confidential relation or where special relations of confidence exist, or where the client had no other independent legal adviser; or where there was some failure on the part of the attorney to make full disclosure to the client as to the extent of the services required.[13] It must be remembered, also, that contracts for additional compensation are subject to strict construction in favor of the client.[14]

12. See supra, § 36.

13. Countryman v. California Trona Co., 35 Cal. App. 728, 170 Pac. 1069, per Richards, J.

14. See infra, § 86.

§ 86. Construction.—In construing contracts between attorneys and clients concerning compensation in which there is any ambiguity as to the intent of the parties, it is the rule generally accepted by courts to adopt such a construction of the contract as will be most favorable to the interests of the client.[15] Where the contract between attorney and client is susceptible of two constructions, it is the duty of the attorney to inform the client of the fact, and having pointed out this liability of the contract, proceed to know, definitely and clearly, his client's views, before proceeding further. Thus an attorney dealing with his client for further professional services, where the contract is reduced to writing, is bound to show, when he seeks to enforce it, that the latter fully understood it in the same sense; otherwise it cannot be enforced. It may therefore be declared, that in all cases where the relation of attorney and clients exists, and it is desired to make further professional engagements, that it is the duty of the attorney to have the contract (if there be one) clearly and definitely stated and understood, not only in its language, but also in its spirit, legal consequences, and practical results.[16] This rule of construction is not so inflexible, however, that it may be invoked to perpetrate a palpable injustice, or that it calls for a construction of such contract beyond the express covenants of the parties.[17] Where no future time is stated as having been agreed upon for the payment of a retaining fee, the inference must be that it was to be paid before the services were rendered, for an attorney is always entitled to his retaining fee in advance unless he stipulates to the contrary.[18]

15. Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43, citing Hitchings v. Van Brunt, 38 N. Y. 335; Burling v. King, 46 How. Pr., N. Y., 452; Sanders v. Seelye, 128 Ill. 631, 21 N. E. 601.

16. Reynolds v. Sorosis Fruit Company, 133 Cal. 625, 66 Pac. 21 (quoting Planters' Bank of Tennessee v. Hornberger, 4 Cold. (Tenn.) 531).

17. Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43.

18. Cavillaud v. Yale, 3 Cal. 108, 58 Am. Dec. 388.

§ 87. Services Covered.—Where an attorney contracts to perform "services" for a stated sum, the word "services" refers to all legal services in connection with the matters concerning which he is consulted, until the business is successfully concluded. It is not reasonable to suppose that the attorney took the precaution to make a contract in writing with his client as to advice and consultation fees, and did not intend to make any contract about attorney's fees in contemplated suit. Neither is it reasonable to suppose that the client employed the attorney to act for him as such in and about contemplated litigation, and agreed to pay him a fee of four hundred dollars for advice, in addition to fees for such litigation as might arise.[19] Where a contract providing for legal services in "pending litigation" is changed to read, "all necessary litigation," it includes all litigation necessary to accomplish the object for which the pending actions were brought, including an action of a particular character not then contemplated.[20]

On the other hand, a contract whereby the attorney, for a stated consideration, agrees to represent his client in a certain matter "in the courts of this state," does not require him to render services in an action with regard to the matter brought in the federal circuit court for California.[1] Again, there is no unqualified rule of law which requires the services of an attorney under a contract of employment in a particular piece of litigation to continue until the final determination of the controversy upon appeal, before the attorney can claim compensation for the services contracted for. Nor does the mere acceptance of a retainer under such a contract necessarily imply a retainer and consequent obligation to carry the controversy to the court of last resort.[2]

19. Reynolds v. Sorosis Fruit Company, 133 Cal. 625, 66 Pac. 21, per Cooper, C.

20. In re Prather's Estate, 60 Cal. Dec. 70, 191 Pac. 521.

1. Mahoney v. Bergin, 41 Cal. 423.

2. Pinto v. Seeley, 22 Cal. App. 318, 135 Pac. 43.

Where the client employs an attorney to collect certain judgments against a drainage district which has been held to have no legal existence, and a settlement is secured out of a legislative appropriation, the board administering the appropriation allowing the claim for the amount specified in the judgment, though not recognizing the judgment as evidence, the claim allowed has been held to be the same as that which the attorney was employed to collect.[3]

§ 88. Unauthorized Contracts.—Where there is no one authorized to make a binding contract employing an attorney, the section of the code providing that the compensation of attorneys is left to the contract of the parties is not applicable.[4] There must be someone on either side authorized to contract, or there is, of course, no valid contract.[5] In this connection, it may be noted that a minor, upon reaching his majority, may disaffirm a contract fixing the compensation of an attorney who has rendered services to him, provided he pays the attorney the reasonable value of his services.[6] So, also, it should be observed that the administrator of the estate of a deceased, although he may employ an attorney,[7] may not bind the estate by the amount of compensation to be paid.[8] Similarly, a guardian ad litem, although he may employ an attorney,[9] cannot make a contract fixing the compensation of the attorney absolutely, so that it will be binding on the ward or the estate.[10] An attorney accepting employment and rendering services in such circum-

3. Craddock v. O'Brien, 104 Cal. 217, 37 Pac. 896.

4. Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78, referring to Code Civ. Proc., § 1021 (see supra, § 84).

5. Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78.

6. Spencer v. Collins, 156 Cal. 298, 20 Ann. Cas. 49, 104 Pac. 320.

7. See supra, § 23.

8. Gurnee v. Maloney, 38 Cal. 85, 99 Am. Dec. 352, as construed in Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78; Estate of Lund, 1 Cof. Prob. Dec. 152.

9. See supra, § 73.

10. Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78.

stances must rely upon the subsequent action of the court in ascertaining and adjudging proper compensation.[11] In accepting his employment he consents to perform his duty without other compensation than may be allowed by the court.[12] Where the employment is by a guardian ad litem, the attorney cannot determine the amount, nor can he retain what he or the guardian ad litem may deem a proper sum, leaving it to the general guardian to sue for the excess. There is no place here for the doctrine of an implied promise upon a quantum meruit. The presumption of a promise is rebutted by the fact that the guardian has no power to contract in such a manner as to bind the assets of the ward except conditionally.[13]

Ratification.—An unauthorized contract made by the manager of a corporation, fixing the compensation of an attorney, may of course be validated by ratification, and this ratification may be found in the fact that the attorney has been permitted to continue in the open and active capacity and service of an attorney for the corporation without objection or inquiry as to the existence or terms of his engagement to do so.[14] Where a corporation has received the benefit of the acts of an attorney, it cannot escape liability for his compensation on the theory that the acts of its officer in employing him were ultra vires.[15]

§ 89. Division of Fee With Layman.—A contract between a third person not an attorney and an attorney and counselor at law that he will procure the attorney's employment by a litigant, and that in consideration of such procurement he is to have from the attorney so employed one-third part of whatever remuneration the latter re-

11. Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78 (guardian ad litem); Estate of Lund, 1 Cof. Prob. Dec. 152 (administrator).

12. Estate of Lund, 1 Cof. Prob. Dec. 152.

13. Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78.

14. Countryman v. California Trona Co., 35 Cal. App. 728, 170 Pac. 1069.

15. Kelly v. Ning Yung Benev. Assn., 2 Cal. App. 460, 84 Pac. 321.

ceives for his services from the litigant, is contrary to public policy and invalid.[16] By the terms of the agreement the layman is to derive a benefit from the rendition of the attorney's services in his professional capacity, and to receive a share of his fee, as if he had been concerned with them as a regularly admitted attorney. He is thus enabled, through an agency, vicariously, and not openly and in his own name, to aid in the prosecution of a matter in litigation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. An attorney is prohibited to allow the direct use of his name as an attorney and counselor at law under these circumstances. Of what avail is such prohibition, if it can be evaded? If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor, and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such a position, and possessing none of the qualifications which the law demands and requires. Such a practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person.[17]

§ 90. Fees for Survivor of Law Firm.—Where law business is intrusted to a firm, it is the duty of both partners to conduct it to an end. This duty they owe to their clients and to each other. This duty continues after the dissolution of the partnership as to all unfinished business.[18] In the discharge of this obligation or duty in

16. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846, holding English decisions to the contrary inapplicable, since compensation of English counsel is fixed by statute, or rules of court, or orders in council.

17. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846, per Thornton, J.

18. Osment v. McElrath, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731. As to the rule that the surviving partner must share fees from firm

relation to the unsettled and unfinished business of the firm, the surviving partner occupies the position of a trustee, and, while he may compromise disputed claims, or modify an existing contract by releasing the other party thereto from some of its obligations, when in the exercise of an honest judgment the best interest of the partnership seems to him to require such action, still, in doing so, he cannot be permitted to make gain for himself at the expense of the estate of the deceased partner, by consenting to the extinguishment of a contract belonging to the partnership, and the substitution therefor of another relating to the same subject matter, and in the profits of which he alone is to participate. Whatever may be the effect of such new or substituted contract as between the immediate parties to it, a court of equity in settling the accounts of the partnership will not treat it as an entire extinguishment of the original contract, or deny the right of the representatives of the deceased partner to an equitable participation in the profits realized from the latter contract, and which may be regarded, so far as concerns the partnership, as only a modification of the former contract. This rule is particularly applicable in the settlement of the partnership accounts of attorneys at law, when the firm has been dissolved by the death of one member leaving contracts not fully performed, often constituting a large part of the assets of the partnership, and which it is the duty of the survivor as far as possible to complete and preserve for the benefit of the firm.[19]

Contracts for Contingent Fees.

§ 91. Validity Generally. — Contracts for contingent fees for attorneys were not tolerated at all at common

business with the estate of the deceased partner, see supra, § 82.

19. Little v. Caldwell, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107, per De Haven, J.

law,[20] but are unquestionably valid in California.[1] This is on the ground that otherwise a party, without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights.[2] Indeed, contrary to the rule prevailing in other jurisdictions,[3] it has been held, though without discussion of this particular point, that a contract for contingent fees is valid, although it contains a provision forbidding settlement by the client without the assent of the attorney and a provision that the attorney shall pay the costs of the suit.[4] In determining whether a contract for compensation is invalid on the ground of immorality, the contingent character of the fee is immaterial,[5] except in the case of proceedings for divorce.[6] The contract is good or bad regardless of that question. The employment of persons to influence legislation, or to influence decisions of the land department, or even the decisions of judicial tribunals, in a proper way, is not against sound public policy, and this, too, even though the compensation for the labor to be performed is contingent upon successful results. The means and methods to be used must be improper, or else such employment is perfectly legitimate in the eyes of the law.[7] Indeed, where it is not stipulated that improper means shall be used, it is permissible to contract for a contingent fee for obtaining a rehearing of a case before

20. Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907.

1. Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907; Bergen v. Frisbie, 125 Cal. 168, 57 Pac. 784; Luco v. De Toro, 91 Cal. 405, 27 Pac. 1082; Stewart v. Robinson, 76 Cal. 164, 18 Pac. 157; Hoffman v. Vallejo, 45 Cal. 564. See, also, CHAMPERTY AND MAINTENANCE.

2. Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907.

3. See 2 Ruling Case Law, pp. 1044, 1045; note, 14 L. R. A. (N. S.) 1101.

4. Hoffman v. Vallejo, 45 Cal. 564. See Hall v. Orloff, 33 Cal. App. Dec. 459, 194 Pac. 296, however, where the court quotes cases holding such agreements void.

5. Bergen v. Frisbie, 125 Cal. 168, 57 Pac. 784.

6. See infra, § 92.

7. Bergen v. Frisbie, 125 Cal. 168, 57 Pac. 784.

the Secretary of the Interior,[8] or for obtaining the issuance of patents upon timber lands by the same officer.[9] A promise to pay a contingent fee must be based upon an express contract, however, for it is never implied in law.[10]

§ 92. Invalidity in Divorce Cases.—A California decision, regarded throughout the United States as a leading case, has established the rule that contracts for contingent fees are not allowed in divorce proceedings.[11] Such a contract is, in its nature, against the policy of the law and contrary to good morals. The law does not favor divorce, and permits it only for approved causes and on sentence from duly established public authority. Therefore, any agreement for divorce, or any collateral bargaining promotive of it, is considered unlawful and void.[12] Moreover, contracts for contingent fees are allowed only in order to make it possible for persons without means to urge a meritorious action or a defense,[13] and in divorce cases the law has taken care that the wife shall not be without assistance in proper cases either to prosecute or defend such actions. The court in its discretion may require the husband to pay as alimony any money necessary to enable the wife not only to support herself, but also to prosecute or defend the action, and is given ample power to enforce such order. The reason or necessity therefor does not exist in such cases as in the others for allowing contingent attorneys' fees, and where the reason ceases the rule or law ceases.[14] Even before the decision declaring this rule, doubt was ex-

8. Stewart v. Robinson, 76 Cal. 164, 18 Pac. 157.

9. Bergen v. Frisbie, 125 Cal. 168, 57 Pac. 784.

10. Ellis v. Woodburn, 89 Cal. 129, 26 Pac. 963, where the court suggests the question as to whether the parties can contract for a "reasonable contingent fee."

11. Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907, per Van Dyke, J.

12. Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907. See DIVORCE AND SEPARATION.

13. See supra, § 91.

14. Newman v. Freitas, 129 Cal. 283, 50 L. R. A. 548, 61 Pac. 907.

pressed as to the validity of such contracts, and it was held that an allowance could not be made to the wife for suit money to cover the compensation of attorneys employed thereunder.[15]

§ 93. Rights and Duties Generally.—Under a contract by an attorney to conduct a case for a retainer and a percentage of the amount recovered, his compensation is dependent upon the satisfaction of a judgment recovered therein.[16] The rights of the attorney are not defeated, however, by the client's acts in compromising his cause of action,[17] or in discharging the attorney without cause.[18] The fact that the client employs another attorney to assist in the work intended does not affect or defeat the rights of the first attorney, or of his assignee under the contract, after substantial performance on his part.[19] Where an attorney has prosecuted a case to judgment, under an agreement for a contingent fee, his refusal to take an appeal from the judgment is not a breach of the contract sufficient to relieve the client from his obligations thereunder. The making of such a contract by the attorney, coupled with the acceptance of a retainer thereunder, does not, as a matter of law, obligate him to prosecute an appeal to the court of last resort.[20] An attorney employed on a contingent basis has the duty of watching the progress of the action and of keeping himself in a position to perform any service which the exigency of the case may demand. The mere fact that he was not present to participate in the reargument of a motion, however, does not preclude his right to the fee, where it cannot be shown that the ultimate

15. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345. See ALIMONY.

16. Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43.

17. See infra, § 94.

18. See infra, § 101.

19. Luco v. De Toro, 91 Cal. 405, 27 Pac. 1082.

20. Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43.

success of the client was due to the argument of another attorney.[1]

§ 94. Effect of Compromise.—Where an attorney contracts for a contingent fee consisting of a part of the property to be recovered, he becomes an equitable owner of the designated part of whatsoever thereafter results from the prosecution or compromise of the suit.[2] It is true that an attorney cannot compromise his client's cause of action,[3] and that an attorney cannot prevent a compromise by his client, but it is equally true that the client cannot, nor can the opposite party, having knowledge of his rights, so compromise the action as to defeat the rights of the attorney in the subject matter of the action.[4] Pursuant to this doctrine it has been held that where the client agrees that in the event of a compromise the attorney shall share to a stated per cent, the attorney, upon the event of the compromise, is entitled to his share direct from the adverse party and need not rely merely upon the personal covenants of his client.[5] Similarly, it has been held that if the client compromises by having money paid to a third party, and such party, in consideration of the money, deeds lands to a fourth party in trust for the client, such fourth party holds in trust for the share of the attorney.[6] On the other hand, where an attorney employed on a contract for a contingent fee, refuses to continue with a case because his client will not agree to additional compensation, he cannot recover, following a compromise made by his client, on the theory that his client has prevented full performance.[7] Furthermore, an agreement giving the attorney

1. Ballard v. Carr, 1 Cal. Unrep. 704.

2. Luco v. De Toro, 91 Cal. 405, 27 Pac. 1082; Hoffman v. Vallejo, 45 Cal. 564.

3. See supra, § 67.

4. King v. Gildersleeve, 79 Cal. 504, 21 Pac. 961.

5. Elliott v. Leopold Min. Co., 52 Cal. 355.

6. Hoffman v. Vallejo, 45 Cal. 564.

7. Houghton v. Clarke, 80 Cal. 417, 22 Pac. 288.

a stated fee in case the client settles is void as against public policy.[7a] The amount recoverable in the event an attorney employed on a contingent fee is discharged without cause is discussed in a later section of this article.[8]

Amount of Compensation.

§ 95. Fee Set by Contract.—The amount of compensation to which an attorney is entitled is limited to the amount set by the contract where the attorney has contracted for a stated fee,[9] for a fee to be fixed by the client,[10] or for a fee contingent upon success,[11] plus interest upon the principal sum.[12] The fact that the services performed by the attorney are reasonably worth more than the price for which he agreed to perform them cannot be considered. Thus where the attorney agrees to perform certain services for the sum of four hundred dollars, it has been said that if the services prove to be much less than the parties had in mind, and are only worth ten dollars, the client is bound by his contract and is liable for the four hundred dollars. The fact that the

7a. Hall v. Orloff, 33 Cal. App. Dec. 459, 194 Pac. 296 (quoting cases from other jurisdictions holding that an agreement that the client will not settle without the consent of the attorney is void).

8. See infra, § 101.

9. Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 Pac. 21; Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78.

10. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903. Even under such a contract, however, the person having the power to fix the fee may not act fraudulently. Foster v. Young, 172 Cal. 317, 156 Pac. 476.

11. Lavenson v. Wise, 131 Cal. 369, 63 Pac. 622. The mere fact that an attorney is to receive a certain fee in the event of success does not indicate that he is to receive no compensation in the event of failure. Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60.

12. Crane v. Stansbury, 173 Cal. 631, 161 Pac. 7, holding that where the complaint in an action to recover attorney's fees charged in several counts upon an account stated, upon an express contract, and upon a quantum meruit, interest on the principal sum sued for is properly included in the verdict for the plaintiff, where the evidence was sufficient to sustain the verdict either upon the count of an account stated or upon the count of an express contract.

attorney makes a bad bargain, and is compelled to do more than four hundred dollars' worth of labor, cannot relieve him of his contract. He is in precisely the same position that any other party would be, who having made a contract for a certain sum to do a certain thing, finds by experience that the sum is not adequate compensation. The law will enforce contracts, but cannot undertake to make them. It is the experience of every lawyer that he often performs services of greater value than the compensation received therefor. Upon the other hand, he often gets more, under a contract, than the actual services prove to be worth. As a general proposition, when the cases are averaged, he manages to get a fair compensation for his time.[13] Nevertheless, contracts beyond all reason will not be enforced. Thus it has been held that where a young and inexperienced lawyer contracts to defend a person charged with crime for the sum of fifteen hundred dollars, the contract is unconscionable and contrary to substantial justice, and only reasonable damages can be recovered.[14]

§ 96. **Reasonable Fee.**—When an attorney performs services for another, at his instance and request, nothing being said as to payment, it is clear that the attorney is entitled to recover the reasonable value of his services.[15] This rule rests on sound theory, for in the absence of any agreement in reference to the compensation of an attorney, there arises the ordinary money obligation which exists upon the employment of one person in the service

13. Reynolds v. Sorosis Fruit Company, 133 Cal. 625, 66 Pac. 21, per Cooper, C.

14. Newmire v. Ford, 22 Cal. App. 712, 136 Pac. 504, holding that an award of one thousand dollars damages is unreasonable.

15. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581; Bock v. City of Eureka, 124 Cal. 61, 77 Am. St. Rep. 149, 56 Pac. 612; Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78; Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141; Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985 (stating the rule given in the text).

of another.[16] Pursuant to this rule, it has been held that where an attorney performs legal service of value for a city, with the assent of the counsel thereof, and in good faith believing he is under a legal employment, an implied promise is raised to pay the reasonable value of the services.[17] So, also, where the attorney offers to undertake litigation for a stated fee or for a contingent fee, and the client fails to make his election and to accept either offer, there is no meeting of the minds, and therefore no contract as to the attorney's compensation, and the attorney is entitled to the reasonable value of his services.[18]

In determining what constitutes a reasonable fee, the court will take into consideration the following factors: The nature of the litigation,[19] its difficulty,[20] the amount involved,[1] the skill required, the skill employed, the attention given,[2] the success or failure of the attorney's efforts,[3] and the attorney's skill and learning,[4] including his age and experience in the particular type of work demanded.[5]

Interest is not ordinarily recoverable on an unliquidated sum due for attorney's services. Nevertheless when the amount of recovery becomes fixed by an account stated, it bears interest thereafter.[6]

16. Gage v. Atwater, 136 Cal. 170, 68 Pac. 581. See MASTER AND SERVANT.

17. Buck v. City of Eureka, 124 Cal. 61, 77 Am. St. Rep. 149, 56 Pac. 612.

18. Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141.

19. Bridges v. Paige, 13 Cal. 640; Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

20. Bridges v. Paige, 13 Cal. 640.

1. Bridges v. Paige, 13 Cal. 640; Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

2. Bridges v. Paige, 13 Cal. 640.

3. Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60.

4. Bridges v. Paige, 13 Cal. 640.

5. Newmire v. Ford, 22 Cal. App. 712, 136 Pac. 504.

6. Crane v. Stansbury, 173 Cal. 631, 161 Pac. 7, holding that a bill of an attorney for services may under proper circumstances be the subject of an account stated. See ACCOUNTS AND ACCOUNTING, vol. 1, § 51.

§ 97. Retaining Fee.—In estimating the value of an attorney's services, it is proper to include in the consideration a reasonable retaining fee,[7] for it is the rule that whenever an attorney is employed generally to prosecute or defend an action, he may, after the action has been terminated, recover from his client a retaining fee, although the contract of employment did not expressly or specifically mention a retaining fee.[8] As the reason for this rule, it has been said that when an attorney is engaged to prosecute or defend an action, his entire services in that action are engaged for his client, and he cannot perform services for the adverse party. He is retained by his client for that entire action; and whether his client may ever call upon him to perform services or not, he cannot perform services in that action for the adverse party, nor can he receive any fee or compensation from the adverse party. All his skill and ability for that case is at the command of his client. A retainer of an attorney at law is presumably worth something to the client, and presumably a loss to the attorney; and whether the attorney is ever called upon to perform any services or not in that case, he may, when the case is terminated, recover for whatever the evidence shows the retainer was worth.[9] By application of this rule, it has been held proper to ask an expert witness the reasonable value of an attorney's services, "including a reasonable retaining fee."[10] So, also, it has been said that while the performance of actual services is not essential in order that a retaining fee may be recovered,[11] it cannot preju-

7. Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956; Knight v. Russ, 77 Cal. 410, 19 Pac. 698; Aydelotte v. Bloom, 13 Cal. App. 56, 108 Pac. 877; Clements v. Watson, 7 Cal. App. 74, 93 Pac. 385.

8. Knight v. Russ, 77 Cal. 410, 19 Pac. 698 (citing Perry v. Lord, 111 Mass. 504; Blackman v. Webb, 38 Kan. 668, 17 Pac. 464).

9. Knight v. Russ, 77 Cal. 410, 19 Pac. 698 (quoting Blackman v. Webb, 38 Kan. 668, 17 Pac. 464).

10. Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956; Aydelotte v. Bloom, 13 Cal. App. 56, 108 Pac. 877.

11. Knight v. Russ, 77 Cal. 410, 19 Pac. 698; Clements v. Watson, 7 Cal. App. 74, 93 Pac. 385.

dice the client to show that upon the faith of a retainer certain specific services were rendered for which the attorney was not otherwise paid and for which he made no other charge.[12]

§ 98. Additional Services.—In determining whether an attorney is entitled to an additional fee for additional services rendered, certain rules already discussed should be recalled. We must remember that an attorney is limited to the fee set by his contract,[13] that this contract will be strictly construed in favor of the client,[14] and that a contract for additional compensation made after the creation of the relation of attorney and client, is presumptively invalid.[15] It is clear that if the attorney contemplates any extra charge, he should notify the client before the services in question are rendered.[16] Thus an attorney who undertakes the collection of a note for an agreed contingent fee, with the understanding that the note will not be contested, may promptly rescind the agreement, or refuse to proceed under it, if the validity of the note is contested, but it is too late to rescind it after the action upon the note is tried and lost, without any prior notice of objection to the contingent fee, or any change in the agreement. The attorney in such case, cannot, after final judgment rendered for the defendant sued upon the note, recover anything for his services upon a quantum meruit.[17] There seems to be no rule, however, precluding recovery for additional compensation, for it has been held that an attorney at law who is the general attorney for a corporation at a salary which may be changed on the option of the corporation may enter into a contract with the corporation to perform special work for a stated compensation, if such contract

12. Clements v. Watson, 7 Cal. App. 74, 93 Pac. 385.

13. See supra, § 95.

14. See supra, § 86.

15. See supra, § 85.

16. Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 Pac. 21.

17. Lavenson v. Wise, 131 Cal. 369, 63 Pac. 622 (approved in Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 Pac. 21).

is voluntary and free from fraud.[18] Again, it has been held that an attorney at law may in an action for professional services also recover compensation for services rendered in the capacity of an attorney in fact.[19]

§ 99. **Firm or Joint Services.**—Ordinarily, where one member of a firm of attorneys is employed, the client is entitled to the services of all the members of the firm. An understanding between the members that, as respects services in a particular case each partner is to act and to receive compensation as an individual, cannot affect the client in the absence of his knowledge and consent to such an arrangement. Consequently, payment to one member of the firm is ordinarily payment to all the members thereof.[20] Attention has been given in earlier sections of this article to the rule that the surviving member of a law firm is not entitled to compensation for completing unfinished work following the death of one partner,[1] and to the rule that he cannot by a new contract deprive the estate of the deceased partner of the benefits belonging to it under the original contract.[2]

In the absence of an agreement to the contrary, attorneys jointly undertaking litigation are entitled to share equally in the compensation.[3] Where two attorneys, not partners, undertake to conduct certain litigation together for a reasonable compensation, there is a joinder of interests, and if land is conveyed to one in payment of services, he holds half thereof in trust for the other.[4]

Where one attorney renders services jointly to two corporations and there is no agreement as to the division of the expense of his fees, one corporation cannot defend by

18. Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743.

19. Creely v. Cohen, 35 Cal. App. 642, 170 Pac. 643.

20. Smith v. Hill, 63 Cal. 51.

1. See supra, § 82.

2. See supra, § 90.

3. Ford v. Freeman, 40 Cal. App. 221, 180 Pac. 545 (citing authorities).

4. Robarts v. Haley, 65 Cal. 397, 4 Pac. 385.

claiming that the other should pay a larger portion of the fee, for this is not a matter with which the attorney is concerned.[5]

§ 100. Moneys Expended by Attorney.—In the absence of a special agreement to the contrary, a client is bound to repay his attorney for all outlays made by him in the payment of the expenses of carrying on the litigation and an attorney is bound to bear his own personal and traveling expenses.[6] In view of this rule, and of the rule that the language used in contracts fixing the compensation of attorneys should not be construed more liberally toward attorneys than its ordinary meaning requires,[7] it has been held that a provision that the client will reimburse the "outlays" of his client refers to costs of suit and other expense paid to third persons, and does not mean the personal or traveling expenses of the attorney.[8] An attorney employed by a person whose property had been stolen, to assist the district attorney in the prosecution of several cases against the alleged thieves, with authority to take such measures as he deems expedient, has power to bind his client by the employment of a detective to seek and obtain evidence in furtherance of the prosecution.[9] On the other hand, an attorney at law has no general authority by virtue of his retainer to employ counsel or assistants at the expense of his client without previous authority or assent on the part of the client.[10] This is in harmony with the general principle that the authority of the attorney cannot be delegated without the client's consent.[11] Furthermore, an attorney has no authority to direct a sheriff to conduct a restaurant business upon

5. Wheeler v. Houston, Gore & Loy, 37 Cal. App. 407, 174 Pac. 121.

6. Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981.

7. See supra, § 86.

8. Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981.

9. Kast v. Miller & Lux, 159 Cal. 723, 115 Pac. 932.

10. Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600; Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899 (citing authorities).

11. See supra, § 52.

which an attachment has been levied and thus thereby bind the client for expenses incurred,[12] and it is therefore error to admit in evidence written directions from the attorney to the sheriff to continue the business and to instruct the jury that the client is liable for services rendered and expenses incurred pursuant to such directions.[13] So, also, an attorney, merely by virtue of his employment and in the absence of express authority, has no implied authority to employ a detective at the expense of his client to assist him in securing evidence and preparing his case for trial.[13a]

§ 101. Effect of Discharge and Compromise.—When an attorney or counselor is unjustly discharged from a case, he can, in California, recover compensation for any damage he may sustain by reason of such discharge.[14] Where an attorney contracts to perform legal services for an agreed fee and his client settles the controversy independently, there is no possible mode of ascertaining the attorney's damages except to adopt the price agreed to be paid.[15] Consequently, an attorney who is employed for a stated fee to assist the regular counsel of his client in prosecuting an action is entitled to recover the sum agreed upon if the client, by failing to prosecute, waives performance on the part of the attorney.[16] The same rule is applicable when the client discharges the attorney without cause.[17]

Similarly, when an attorney contracts to perform services for a contingent fee, it is the rule that if the client,

12. Alexander v. Denaveaux, 59 Cal. 476; Alexander v. Denaveaux, 53 Cal. 663.

13. Alexander v. Denaveaux, 59 Cal. 476.

13a. Davis v. MacKay, 33 Cal. App. Dec. 715, 194 Pac. 738.

14. In re Cowdery, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47. As to the right of the client to discharge his attorney, see supra, § 38.

15. Webb v. Trescony, 76 Cal. 621, 18 Pac. 796; Baldwin v. Bennett, 4 Cal. 392.

16. Carter v. Baldwin, 95 Cal. 475, 30 Pac. 595.

17. Countryman v. California Trona Co., 35 Cal. App. 728, 170 Pac. 1069.

by his wrongful conduct, prevents the performance of acts which entitle the attorney to a specific recompense, such amount and interest from the time it became due may be recovered by the attorney.[18] Thus the attorney is entitled to his share of the proceeds if the client compromises the case.[19] Nevertheless, an attorney employed on a contract for a contingent fee cannot recover damages for the breach of his contract of employment where it appears that the action in which he was retained would not have terminated favorably if it had been prosecuted to final judgment.[20]

§ 102. Effect of Negligence.—The amount of compensation due an attorney may be diminished due to his negligence.[1] Even if the negligence is not such as to be actionable, it should still be considered in determining the value of his services. If because of the unskillful or negligent manner in which the service was performed it was a detriment and not an advantage, no compensation should be allowed.[2] If the attorney, by apparent neglect,[3] or by actual absence,[4] renders it necessary for the client, as a prudent man, to employ other counsel, justice demands that the attorney should bear the expense thus incurred, to the extent of a reasonable sum in payment.[5] Where an attorney assists an executor in a suit as part of his services toward the executor generally, the fact that he did not ask for compensation for his services in the suit does not prevent a consideration of the question of

18. Bartlett v. Odd Fellows Sav. Bank, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743.

19. See supra, § 94.

20. Swinnerton v. Monterey County, 76 Cal. 114, 18 Pac. 135. See, however, Hall v. Orloff, 33 Cal. App. Dec. 459, 194 Pac. 296, where it is intimated that recovery on quantum meruit is possible.

1. Estate of Kruger, 130 Cal. 621, 63 Pac. 31; Bridges v. Paige, 13 Cal. 640; McNutt v. Pabst, 25 Cal. App. 177, 143 Pac. 77. As to the liability of an attorney for his negligence, see supra, § 73 et seq.

2. Estate of Kruger, 130 Cal. 621, 63 Pac. 31.

3. Ballard v. Carr, 1 Cal. Unrep. 704.

4. Ballard v. Carr, 48 Cal. 74.

5. Ballard v. Carr, 48 Cal. 74; Ballard v. Carr, 1 Cal. Unrep. 704.

his negligence therein as affecting his compensation for the general services rendered.[6] On the other hand, the fact that an attorney, seeking to enforce a just demand, sues a nonresident defendant who does not own property in California by published summons and thereby obtains an invalid judgment, does not preclude a claim for compensation for such services if the attorney advised the client that they lacked legal efficacy.[7] Negligence in services rendered prior to those for which compensation is sought does not affect the value of the services in dispute and cannot be considered when not pleaded.[8] Again, the fact that services which were in part proper were in part negligent and unskillful will not necessarily prevent recovery for the part which was skillful.[9]

Actions for Compensation.

§ 103. Accrual of Cause.—Where an attorney represents his client in a single employment, his cause of action for services rendered accrues when his services end.[10] Where an attorney represents his client in distinct matters under a general retainer, the attorney's right of action accrues upon the performance and completion of each matter, in the absence of any provision as to time or amount of payment. It can make no difference, so far as this rule is concerned, that the retainer or employment is limited to possible litigation of a specific character. The termination of suit is the end of a separate matter, within the meaning of this rule, even though the general contract of retainer is not terminated.[11] Where the attorney con-

6. Estate of Kruger, 130 Cal. 621, 63 Pac. 31.

7. Hinckley v. Krug, 4 Cal. Unrep. 208, 34 Pac. 118.

8. Perkins v. West Coast Lumber Co., 4 Cal. Unrep. 155, 33 Pac. 1118.

9. Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60.

10. Johnson v. Bank of Lake, 125 Cal. 6, 73 Am. St. Rep. 17, 57 Pac. 664 (an action on stockholder's liability for legal services rendered to a corporation); Hancock v. Pico, 47 Cal. 161.

11. Osborn v. Hopkins, 160 Cal. 501, Ann. Cas. 1913A, 413, 117 Pac. 519, per Angellotti, J.

tracts to render services and to receive no compensation until his client is paid money by another person, the attorney's cause of action does not accrue until the money is paid by such person to his client.[12] Where the attorney contracts to perform services for a compensation to be fixed by his client, the client's determination of the fee is ordinarily a condition precedent to action therefor, even when not specifically so stated in the contract.[13] Where the attorney contracts for a fee contingent upon the defeat of a pending action against the client, the action is not defeated until the judgment has become final, and an action brought for such services pending an appeal is prematurely brought.[14]

§ 104. Action on Quantum Meruit.—Where an attorney renders services without an agreement as to compensation, he is entitled to a reasonable fee,[15] and may sue to recover on quantum meruit.[16] Common counts may be used to state a cause of action for a balance due for legal services, notwithstanding the code requirement that the complaint shall contain a plain and concise statement of the facts constituting the cause of action.[17]

On the other hand, where the attorney renders services under an agreement as to his fee, he is entitled only to the fee stated in the contract.[18] Consequently, where he contracts to perform services for a contingent fee,[19] or for a fee to be determined by his client,[20] he cannot sue

12. Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743, holding that the same rule applies to the attorney's action for wrongful discharge.

13. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903.

14. Cuneo v. Davis, 36 Cal. App. 351, 171 Pac. 1079.

15. See supra, § 96.

16. Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Crane v. Stansbury, 173 Cal. 631, 161 Pac. 7; Bridges v. Paige, 13 Cal. 640 (quantum valebat); Aydelotte v. Billing, 8 Cal. App. 673, 97 Pac. 698.

17. Carter v. Canty, 181 Cal. 749, 186 Pac. 346. See ASSUMPSIT, ante, p. 375.

18. See supra, § 95.

19. Lavenson v. Wise, 131 Cal. 369, 63 Pac. 622.

20. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903.

for the reasonable value of his services on a quantum meruit. If he attempts to do so, he will necessarily be defeated, for the probata and allegata will not at all correspond.[1] Obviously an attorney cannot recover compensation on a quantum meruit for worthless services.[2] Similarly, services rendered by an attorney at law in an ineffectual effort inaugurated by himself to secure professional employment on a contingent basis of payment in connection with a prospective litigation, which services consisted of advice and information given the prospective client while the negotiations for employment were pending, do not give a right to payment based upon a quantum meruit.[3]

§ 105. Suit for Specific Performance.—Whether an attorney who has contracted to perform legal services in consideration of the conveyance of real property may maintain a suit for specific performance depends on whether or not he has performed the services contemplated by the agreement. It is clear that the attorney cannot obtain specific performance of such a contract until he has fully performed,[4] for equity will not decree specific performance of a contract to furnish personal services of a confidential nature, since there is no mutuality.[5] On the other hand, if the attorney can show a substantial performance on his part, he is entitled to a decree of specific performance,[6] even though he has been negligent,[7]

1. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903. See PLEADINGS.

2. Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60.

3. Estate of Mumford, 173 Cal. 511, 160 Pac. 667.

4. King v. Gildersleeve, 79 Cal. 504, 21 Pac. 961; Howard v. Throckmorton, 48 Cal. 482.

5. King v. Gildersleeve, 79 Cal. 504, 21 Pac. 961. For the theory of mutuality, see SPECIFIC PERFORMANCE.

6. Howard v. Throckmorton, 48 Cal. 482; Ballard v. Carr, 48 Cal. 74; Ballard v. Carr, 1 Cal. Unrep. 704. See, also, Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536, where Howard v. Throckmorton, 48 Cal. 482, is summarized and quoted.

7. Ballard v. Carr, 1 Cal. Unrep. 704.

or has not fully performed the required services himself.[8] In such a situation the attorney must compensate the client for damages which have resulted from his negligence or failure to perform, consisting of the reasonable value of the services of the counsel employed in the place of the original attorney.[9] The fact that the property in question has greatly enhanced in value since the contract between attorney and client was made and that this enhancement is in a material degree the result of the labor and money of the client, presents no valid objection to the decree for specific performance.[10]

§ 106. Pleadings by Attorney.—Where an action is brought to recover the value of an attorney's services, it is not necessary to set forth the items of the account in the complaint. It is sufficient to state the facts constituting the cause of action in ordinary and concise language. If the defendant desires further particulars, he may call for them and they must be given him within a limited time. At the trial, if an issue has been tendered as to the value of the services, their value must be proved, and that will include the value of the retainer.[11] Uncertainties in the allegations of the complaint with respect to the specific services rendered cannot be relied upon as a ground for reversal when a bill of particulars, furnished during the pendency of the action, set forth the particulars upon which the claim for compensation is based.[12]

Admission to practice.—It is probably unnecessary, though certainly preferable, to allege in the complaint that the plaintiff was an attorney admitted to practice.[13]

8. Howard v. Throckmorton, 48 Cal. 482; Ballard v. Carr, 48 Cal. 74 (when the court found a waiver on the part of the client).

9. Ballard v. Carr, 48 Cal. 74; Ballard v. Carr, 1 Cal. Unrep. 704.

10. Howard v. Throckmorton, 48 Cal. 482.

11. Knight v. Russ, 77 Cal. 410, 19 Pac. 698; Aydelotte v. Bloom, 13 Cal. App. 56, 108 Pac. 877.

12. Countryman v. California Trona Co., 35 Cal. App. 728, 170 Pac. 1069.

13. Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

A complaint which avers that the services were performed by a firm "engaged in the practice of law, as attorneys and counselors at law, in the city of Los Angeles," is not insufficient for not averring their authority to practice law. From the allegations made it will be presumed, if necessary, that they were regularly authorized to practice.[14]

Fee to be fixed by client.—Where the fee is to be determined by the client, the attorney, in suing for compensation, should have his complaint count on the special contract, and should allege, as a breach thereof, either that the agreement has been repudiated by the client or that he has refused to act thereunder in fixing the compensation.[15]

Promise of payment.—A complaint in assumpsit for legal services which alleges that the legal services were performed at the special instance and request of the defendant, and states what they were reasonably worth, is not demurrable for not alleging that defendant promised to pay what the services were reasonably worth. It is never necessary to allege a promise where the law implies one.[16]

Payment.—The complaint must allege the nonpayment of the claim,[17] but where the complaint alleged the performance of legal services by a certain firm of attorneys for defendant within two years, and that they were of the reasonable value of $750, "that no part of said sum has been paid; and the whole thereof . . . is now due, owing and unpaid," and alleges an assignment of the claim by the firm to the plaintiff, it appears by irresistible conclusion from

14. Prince v. Kennedy, 3 Cal. App. 404, 85 Pac. 859.

15. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903. See, however, Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956, saying that this statement, not having been concurred in by a majority of the court, is not the law of the case.

16. Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

17. Harlan v. Lambert, 19 Cal. App. 349, 125 Pac. 1079.

the specific facts alleged that that sum is due "from defendant to plaintiff," and that is sufficient.[18]

§ 107. Pleadings by Client.—As a rule, the pleading of the client in an action by the attorney for his compensation should either deny the material allegations of the complaint or set up some sufficient affirmative defense.[19] It is the duty of the client, when sued by his attorney in an action for compensation, to set up in his pleadings such a defense as the illegality of the advice given by the attorney. Unless he does so, the defense is not in issue.[20] Nevertheless, where the client, sued on a quantum valebat for the professional services of his attorney, denies that he is indebted at all and that the services are of the value charged, he may show that they were not of this value by any legal proof, and he is not bound to set out his proof in his pleading.[1] After failing to demur to the answer, going to trial, and obtaining a judgment for less than the amount for which he sued, the attorney cannot raise for the first time the claim that the answer, because of a negative pregnant, failed to deny the value of the services alleged in the complaint.[2] In an action on an express contract for an attorney's compensation, the client is estopped to defend on the ground that the services contemplated by the contract were contra bonos mores.[3]

§ 108. Evidence as to Value of Services.—Where an attorney sues for the value of his services, whatever has a legal tendency to prove that these services were worth the

18. Prince v. Kennedy, 3 Cal. App. 404, 85 Pac. 859.

19. 2 Thornton on Attorneys at Law, p. 880.

20. Prince v. Kennedy, 3 Cal. App. 498, 86 Pac. 609.

1. Bridges v. Paige, 13 Cal. 640 (admitting evidence that the attorney was negligent).

2. Zimmer v. Kilborn, 165 Cal. 523, Ann. Cas. 1914D, 368, 132 Pac. 1026.

3. Ballard v. Carr, 1 Cal. Unrep. 704.

sum is admissible, as the nature of the suit,[4] its difficulty,[5] the amount involved,[6] the skill required, the skill employed, and the like.[7] So the client has the right to prove these same general matters, or the negation of them, as, for example, that it was a plain case, requiring but little labor or skill, learning or time; or if it required skill and attention, that these were not bestowed.[8] Where it is shown that, as the result of the litigation, a life estate was secured, evidence is therefore admissible to show its monthly rental, and to show by the tables of mortality the average expectancy of life of a person of the age of the defendant at the time when the litigation was terminated, as a circumstance tending to show the value of the legal services.[9] For the purpose of aiding in determining the value of the services rendered, it is proper to receive evidence as to the prices usually charged and received for similar services by other persons in the same profession, in the same vicinity, and practicing in the same court.[10] It is improper, however, to receive evidence of the value of the services of the same attorney rendered in another suit.[11] Accounts rendered by the attorney to his client are admissible in evidence against the attorney,[12] but hearsay is, of course, inadmissible to prove the value of an attorney's services or the fact of his employment.[13] Attention is given in later sections to the admissibility and conclusiveness of expert testimony.[14]

4. Bridges v. Paige, 13 Cal. 640; Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

5. Bridges v. Paige, 13 Cal. 640.

6. Bridges v. Paige, 13 Cal. 640; Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

7. Bridges v. Paige, 13 Cal. 640. As to the factors determining what is a reasonable fee, see supra, § 96.

8. Bridges v. Paige, 13 Cal. 640 (holding that the client may show these matters under a general denial).

9. Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

10. Knight v. Russ, 77 Cal. 410, 19 Pac. 698.

11. Hart v. Vidal, 6 Cal. 56.

12. Reid v. Warren Improvement Co., 17 Cal. App. 746, 121 Pac. 694.

13. Miner v. Rickey, 5 Cal. App. 451, 90 Pac. 718.

14. See infra, §§ 110, 111.

§ 109. Evidence as to Miscellaneous Matters.—Where there is a dispute as to the amount of a contingent fee to be paid, evidence is admissible to prove the value and usual price of the services rendered.[15] Such evidence is not admissible, however, where there is no dispute as to the amount of the fee, as where the dispute is as to the existence of the contract,[16] or whether a contract is for an unconditional fee.[17] In an action to recover the reasonable value of legal services, oral evidence is admissible to prove that after entering into a written contract providing for the payment of a contingent fee, the parties entered into a new and distinct oral agreement providing that the plaintiff should be paid a fair fee for his services.[18] In an action by an attorney for services, a complaint in an action against the client by third parties charging him with fraud is clearly admissible for the one purpose of showing the nature of services performed in negotiating and finally securing a dismissal of that suit.[19] Under a complaint alleging an unconditional agreement to pay a certain sum of money for the plaintiff's services as an attorney, and that the services were reasonably worth such sum, evidence of an agreement to pay that amount on a contingency and the happening of the contingency is inadmissible.[20] An entry in an attorney's account-book, "agreed fee to be one-half" is not admissible to prove a contract for a contingent fee, since the entry is not the proper subject for a book account.[1] Where the complaint alleges full performance by the attorney, and the evidence, received without objection,

15. Ellis v. Woodburn, 89 Cal. 129, 26 Pac. 963.

16. Ellis v. Woodburn, 89 Cal. 129, 26 Pac. 963; Ellis v. Woodburn, 3 Cal. Unrep. 288, 24 Pac. 893.

17. Owen v. Meade, 104 Cal. 179, 37 Pac. 923.

18. Keeley v. Erbe, 33 Cal. App. 267, 164 Pac. 906.

19. Avery v. Wiltsee, 177 Cal. 484, 171 Pac. 95 (where the court says that it might have been more just to exclude it to prevent its improper influence on the jury).

20. Owen v. Meade, 104 Cal. 179, 37 Pac. 923.

1. Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141.

shows performance except as to a matter which the client waived, the variance, not being prejudicial, is not material.[2] Where the attorney bases his claim on a direct employment by the client, and not upon employment by an agent of the client, the rejection of evidence offered by the client of his instructions to such agent with reference to the scope of his employment, not communicated to the attorney, is not prejudicial error unless its rejection results in a miscarriage of justice.[3] The fact that the court allowed counsel for the attorney to state to the jury that it was called at the client's request and to question the jury's ability to pass on attorney's fees as intelligently as a court might be able to do does not operate to prejudice the client.[4]

§ 110. **Admissibility of Expert Testimony.**—The testimony of attorneys is of course admissible as expert evidence to prove the value of an attorney's services,[5] although it is well settled that such testimony is not conclusive upon the jury or the court.[6] An attorney, suing for the value of services rendered, is a competent witness in his own behalf as to whether he is an attorney at law, how long he has practiced law, and what has been his income for the last two or three years.[7] It has been said by the California court that one who is not a lawyer is not such an expert as the rules of law admit to prove the value of an attorney's services,[8] although it is usually held that anyone who is familiar with the customary and

2. Carter v. Baldwin, 95 Cal. 475, 30 Pac. 595.

3. Avery v. Wiltsee, 177 Cal. 484, 171 Pac. 95.

4. Clements v. Watson, 7 Cal. App. 74, 93 Pac. 385.

5. Spencer v. Collins, 156 Cal. 298, 20 Ann. Cas. 49, 104 Pac. 320 (citing Forsyth v. Doolittle, 120 U. S. 73, 30 L. Ed. 586, 7 Sup. Ct. Rep. 408, see, also, Rose's U. S. Notes; Louisville etc. R. Co. v. Wallace, 136 Ill. 87, 11 L. R. A. 787, 26 N. E. 493); Freese v. Pennie, 110 Cal. 467, 42 Pac. 978; Fairchild v. Whitmore, 6 Cal. App. 52, 91 Pac. 336. See, generally, the cases cited in this and the following section.

6. See infra, § 111.

7. Knight v. Russ, 77 Cal. 410, 19 Pac. 698.

8. Hart v. Vidal, 6 Cal. 56.

usual charges of lawyers for services similar to these for which compensation is sought and in the same locality where such services are rendered may qualify as an expert in this respect, even though he is not a member of the bar.[9] Thus the federal court has held that the testimony of a mining engineer is admissible to prove the value of a judgment obtained as a result of an attorney's services where the judgment relates to patents for mining operations.[10] An expert witness, testifying as to the value of an attorney's services may be asked hypothetical questions, based on the evidence already adduced in the case, as to the value of the services rendered,[11] but may not be asked hypothetical questions which assume facts not in evidence.[12]

§ 111. Conclusiveness of Expert Testimony.—While proper expert testimony is clearly admissible,[13] it is not conclusive, either upon the jury[14] or the court.[15] It is not binding upon the jury, for they may apply to the testimony their own experience and knowledge of the character of such services.[16] If this doctrine is applicable to jury trials, there is much more reason for applying it in a case tried before a court. The value of an attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and

9. 2 Thornton on Attorneys at Law, p. 938.

10. Moore Filter Co. v. Taugher, 239 Fed. 105, 151 C. C. A. 279.

11. Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940 (setting forth the question asked and the supporting evidence); McNutt v. Pabst, 25 Cal. App. 177, 143 Pac. 77; Fairchild v. Whitmore, 6 Cal. App. 52, 91 Pac. 336.

12. Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956.

13. See supra, § 110.

14. Zimmer v. Kilborn, 165 Cal. 523, 132 Pac. 1025; Spencer v. Collins, 156 Cal. 298, 20 Ann. Cas. 49, 104 Pac. 320.

15. Spencer v. Collins, 156 Cal. 298, 20 Ann. Cas. 49, 104 Pac. 320; Freese v. Pennie, 110 Cal. 467, 42 Pac. 978; Estate of Dorland, 63 Cal. 281.

16. Spencer v. Collins, 156 Cal. 298, 20 Ann. Cas. 49, 104 Pac. 320 (citing Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028, see, also, Rose's U. S. Notes; Estate of Dorland, 63 Cal. 281, and other authorities).

the nature of such services, its own experience furnishes it with every element necessary to fix their value.[17] Consequently, the trial court is not bound to fix the amount of the fee in accordance with the opinion of expert gentlemen, learned in the law. Attorneys are inclined to place a very high estimate upon the value of their services when rendered in important litigation; and, also, inclined to look with kindly eyes and sympathetic feelings upon the efforts of brother attorneys when engaged in establishing before the court the value of services performed in large estates fortunate enough to possess well-filled coffers. Under these conditions, when upon the witness-stand as experts they entertain most liberal views as to what should be the amount of a brother attorney's allowance, and hold large ideas as to the importance of the litigation in which he has been engaged. It is well, and it is the law, that the court should temper this kind of evidence with its own calm judgment, based upon the amount and kind of labor performed, and to thereupon make its decree.[18] Indeed, it is not necessary that any evidence of a professional nature be introduced as to the value of an attorney's services, at least in the case of services rendered an estate where the court is familiar with the legal services needed and can determine what is a reasonable fee from its own knowledge and experience.[19]

§ 112. Burden of Proof.—At the trial, if an issue has been tendered as to the value of the attorney's services, their value must be proved.[20] An attorney who has

17. Spencer v. Collins, 156 Cal. 298, 20 Ann. Cas. 49, 104 Pac. 320, per Sloss, J.

18. Freese v. Pennie, 110 Cal. 467, 42 Pac. 978, per Garoutte, J.

19. Estate of Straus, 144 Cal. 553, 77 Pac. 1122; Kendrick v. Gould, 34 Cal. App. Dec. 763 (March 11, 1921). See, also, Reid v. Warren Improvement Co., 17 Cal. App. 746, 121 Pac. 694 (holding that there was sufficient evidence to enable the court to fix the compensation and saying that the court may exercise its own judgment and knowledge).

20. Knight v. Russ, 77 Cal. 410, 19 Pac. 698; Harlan v. Lambert, 19 Cal. App. 349, 125 Pac. 1079; Aydelotte v. Bloom, 13 Cal. App. 56, 108 Pac. 877.

a contract for one thousand five hundred dollars to defend a person charged with a crime, and to employ necessary physicians, detectives and other help when the same becomes necessary, cannot recover from the client for a breach of the agreement, when there is no evidence as to what would be a reasonable or necessary expenditure for such help, and it is a matter of conjecture whether any sum would remain as compensation to the attorney for his services after the making of the agreed expenditures.[1] On the other hand, where the client pleads a special contract that if the attorney is successful in the action he is to be paid what his services are reasonably worth, but if he fails he is to make no charge and receive no compensation, the court properly instructs the jury that the burden is on the client to prove the special contract alleged, and that unless he establishes it by a preponderance of evidence, his defense founded upon such special contract will fail entirely.[2] So, also, where the client, without notice to his attorney, employs another attorney to collect his claims, and is sued by the first attorney for a contingent fee agreed upon, the burden of proof is on the client to show that the attorney has abandoned the collection of his claims, either expressly or by lack of such effort as would reasonably show an abandonment.[3] In view of the presumption that one who acts as attorney is authorized to do so,[4] it has been held that there can be no nonsuit on the ground that the attorney has not proved employment by his client where the answer admits that the plaintiff acted as attorney.[5] The fact that the client has allowed the statute of limitations to run against his cause of action is strong evidence that he has abandoned his intention of bringing a suit.[6]

1. Newmire v. Ford, 22 Cal. App. 712, 136 Pac. 504.
2. Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.
3. Craddock v. O'Brien, 104 Cal. 217, 37 Pac. 896.
4. See supra, § 51.
5. Shain v. Forbes, 82 Cal. 577, 23 Pac. 198.
6. Carter v. Baldwin, 95 Cal. 475, 30 Pac. 595.

§ 113. Findings and Verdict.—Several California cases have considered the construction of findings rendered in actions for the compensation of attorneys. Where findings are not waived, it must be substantially found, in order to support a judgment for the plaintiff, that the money had not been paid. Within this rule, it is sufficient to find that the services were worth six hundred and fifty dollars and that one hundred and fifty dollars has been paid thereon, for this necessarily implies a finding that five hundred dollars is still unpaid.[7] A finding that the original attorney, pursuant to authority given him, did, as agent and in behalf of the client, employ a law firm to assist in the prosecution of a suit, necessarily implies, where nothing appears to the contrary, that the client, as principal, was to pay for services of the firm.[8] A finding that a client who was authorized to name a reasonable fee, did not act in good faith, and after full consideration, and on proper advice, is to be construed as a finding that the client acted in bad faith.[9] Where the trial court finds that the supposed client did not engage the services of the attorney, nor employ him in the transaction in question, nor request him to employ the services rendered, it is unnecessary to find the person to whom the services were rendered.[10] Where the jury first returns with a verdict of five hundred dollars for the attorney, based on the value of his services, and a verdict of three hundred and twenty-five dollars for the client, based on the attorney's negligence, it is proper for the court to have the jury returned to the jury-room and have the verdict corrected to read one hundred and seventy-five dollars for the attorney.[11]

7. Harlan v. Lambert, 19 Cal. App. 349, 125 Pac. 1079.

8. Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

9. Foster v. Young, 172 Cal. 317, 156 Pac. 476.

10. Merrill v. Gunnison, 145 Cal. 544, 79 Pac. 67.

11. McNutt v. Pabst, 25 Cal. App. 177, 143 Pac. 77.

§ 114. Questions on Appeal.—Pursuant to the general doctrines governing appeals, an appellate court will not set aside the findings of the trial court or reverse the judgment rendered thereon if they are at all supported by the evidence.[12] Thus where the trial court has fixed the compensation of an attorney upon the consideration of the evidence and its own judgment, the appellate court will not interfere unless a plain and palpable abuse of its discretion has occurred.[13] Where the evidence without conflict places the value of an attorney's services at a figure which fully warrants the verdict as reduced by the action of the trial court, the appellate court will not interfere therewith on any theory that it is not warranted by the evidence.[14] So, also, where the testimony of two witnesses places the value of an attorney's fees as the sum awarded, the finding will not be disturbed, although there is other evidence contradictory.[15] Where the trial

12. Carter v. Canty, 181 Cal. 749, 186 Pac. 346 (existence of valid claim); Henshall v. Coburn, 177 Cal. 50, 169 Pac. 1014 (payment of associate counsel); Merrill v. Gunnison, 145 Cal. 544, 79 Pac. 67 (employment by client); Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956 (contract for fee to be fixed by client); Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600 (payment of associate counsel); Kendrick v. Gould, 34 Cal. App. Dec. 763 (March 11, 1921) (employment by client in private capacity rather than as executor); Countryman v. California Trona Co., 35 Cal. App. 728, 170 Pac. 1069 (ratification of contract of employment by board of directors); Kierski v. Lick Co., 29 Cal. App. 480, 156 Pac. 69 (value and time of rendition of services); Fernandez v. Watt, 26 Cal. App. 86, 146 Pac. 47 (value of services); Reid v. Warren Improvement Co., 17 Cal. App. 746, 121 Pac. 694 (terms of contract for compensation); Aydelotte v. Bloom, 13 Cal. App. 56, 108 Pac. 877 (nature of services); Brooks v. Ardizzone, 9 Cal. App. 215, 98 Pac. 393 (time of services); Flinn v. Crooks, 2 Cal. App. 335, 83 Pac. 812 (value of services). In Dunlap v. Standard Consolidated Min. Co., 61 Cal. 237, evidence was held sufficient to support the findings that the attorney was employed by an authorized agent of the defendant and that the value of the services rendered was one thousand dollars.

13. Estate of Adams, 131 Cal. 415, 63 Pac. 838; Freese v. Pennie, 110 Cal. 467, 42 Pac. 978; Watson v. Sutro, 103 Cal. 169, 37 Pac. 201.

14. Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956.

15. Prince v. Kennedy, 3 Cal. App. 498, 86 Pac. 609.

court finds that the employment of an attorney for the executor in the conduct of a suit is part of his services for the executor generally, neither the attorney nor the executor can question the ruling on appeal.[16] Obviously the appellate court will not reverse a judgment for the attorney because the evidence is against him on a matter which has not been put in issue by the pleading.[17]

In a clear case, however, findings will be set aside as based on an abuse of discretion or as not supported by the evidence.[18] Thus it has been said that there is a wide and essential difference between a contract for an absolute fee and a contract for a contingent fee, and proof of one will not support a finding that the other was made.[19] Where the value of services sued for is found to be more than alleged in the complaint, the complaint cannot be amended on appeal to conform to the findings.[20]

VIII. DISBARMENT AND SUSPENSION.

In General.

§ 115. Introductory.—The powers and privileges of a lawyer are extensive, and of great importance to the public interests. The legislature and the courts have always carefully guarded the profession against being degraded or corrupted, that it may command the confidence and respect of the public.[1] No one not a lawyer can fully realize the opportunities for undiscovered peculation, graft and embezzlement which are afforded the practitioner at the bar. No one not a lawyer can so well under-

16. Estate of Kruger, 130 Cal. 621, 63 Pac. 31.

17. Prince v. Kennedy, 3 Cal. App. 498, 86 Pac. 609.

18. Newmire v. Ford, 22 Cal. App. 712, 136 Pac. 504. See, also, Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43, where certain testimony is held insufficient to sustain a finding of a written contract for compensation.

19. Owen v. Meade, 104 Cal. 179, 37 Pac. 923.

20. Perkins v. West Coast Lumber Co., 4 Cal. Unrep. 155, 33 Pac. 1118.

1. Cohen v. Wright, 22 Cal. 293.

stand the degree to which the public is entitled to protection from dishonesty in the profession. When a member of the profession has been found lacking in the requisites which go to make him a helper to his clients and has been discovered to possess aims, views and purposes which indicate a moral obliquity in him, and which might make his clients his victims, it is well that he were removed from the possibility of doing them harm.[2] It should be remembered that disbarment is not ordered as a punishment of the attorney, but as a measure necessary for the protection of the public.[3] The power to disbar is vested in the supreme court, district court of appeal, and superior courts,[4] but the grounds for disbarment are limited by statutory declaration,[5] and the procedure is specified by the Code of Civil Procedure.[6]

§ 116. Jurisdiction Generally.—Section 287 of the Code of Civil Procedure designates the courts having power to remove or suspend attorneys and the causes for which such removal or suspension may be made.[7] The language of this section is general, and it vests concurrent jurisdiction thereof in the supreme court, the district courts of appeal and the superior courts.[8] A justice of the peace is not a court which has power to remove or suspend an attorney,[9] and the supreme court will not take jurisdiction of a disbarment proceeding unless it is instituted by a bar association or is based on misconduct

2. Matter of Application of Shepard, 35 Cal. App. 492, 170 Pac. 442, per Works, J., pro tem.

3. Cohen v. Wright, 22 Cal. 293; Matter of Application of Shepard, 35 Cal. App. 492, 170 Pac. 442.

4. See infra, § 116.

5. See infra, § 118.

6. See infra, §§ 130–138.

7. Baird v. Justice's Court, 11 Cal. App. 439, 105 Pac. 259. For the language of this section, see infra, § 118.

8. Barnes v. District Court of Appeal, 178 Cal. 500, 173 Pac. 1100. See, also, Danford v. Superior Court, 33 Cal. App. Dec. 168, 193 Pac. 272, where it is said that the power of the superior court to disbar is statutory and is not subject to any constitutional objection.

9. Baird v. Justice's Court, 11 Cal. App. 439, 105 Pac. 259.

before that court.[10] The power of the courts to disbar attorneys for misconduct and to deprive them of the privilege of practicing their profession arises from the fact that attorneys are officers of the court.[11] As a general rule, every court which has the authority to admit attorneys to practice has the inherent power of striking their names from the rolls, or of expelling them from the bar, whenever they are guilty of such conduct, either in or out of their profession, as shows them to be unfit persons to practice it.[12] The right in one court to admit to practice in all courts of record does not necessarily exclude the right of suspension by any court of record. Thus, in California the right to practice in all courts was formerly vested in the supreme court alone, and is now vested in the district courts of appeal, yet the power to "remove and suspend" is conferred upon the superior courts.[13] In the absence of any proof as to the laws of another state, a strong presumption arises that a court therein had jurisdiction to render an order of suspension.[14]

§ 117. Jurisdiction of Supreme Court.—The supreme court of California has both original and appellate jurisdiction of proceedings for the disbarment of attorneys at law,[15] but it will not entertain proceedings to disbar attorneys for alleged professional misconduct unless the proceeding is instituted or supported by a bar association,[16] or other public body in the public interest,[17] or the misconduct is alleged to have direct connection with matters pending in that court.[18] In other words, the

10. See infra, § 117.

11. Cohen v. Wright, 22 Cal. 293. As to the status of attorneys as officers, see supra, § 17.

12. People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

13. Case of Lowenthal, 61 Cal. 122.

14. Case of Lowenthal, 61 Cal. 122.

15. In re Ashley, 146 Cal. 600, 80 Pac. 1030.

16. In re Ashley, 146 Cal. 600, 80 Pac. 1030; In re Delmas, 7 Cal. Unrep. 146, 72 Pac. 402.

17. In re Ashley, 146 Cal. 600, 80 Pac. 1030.

18. In re Delmas, 7 Cal. Unrep. 146, 72 Pac. 402.

supreme court will not entertain an original proceeding for disbarment in the absence of a showing of good reasons for the failure to first resort to the superior court.[19] Consequently, where the accusation is by a private party, alleging misconduct prejudicial to himself, the proceeding should be instituted in the superior court, and if brought in the supreme court, will be dismissed without prejudice.[20]

This course is sufficiently justified by the fact that the superior courts, which have a concurrent jurisdiction in proceedings to disbar attorneys, have time to spare for the necessary investigation, while the time of the supreme court is more than exhausted in the effort to dispose of matters which cannot be litigated elsewhere.[1] It is also a weighty consideration that the convenience of witnesses requires that the issues of fact involved in any proceeding should be tried in local tribunals, rather than in a court which sits in only one place in a state.[2]

Grounds Generally.

§ 118. Statutory Declaration.—The causes for which an attorney may be removed or suspended are stated in section 287 of the Code of Civil Procedure:[3]

"An attorney and counselor may be removed or suspended by the supreme court, or any department thereof, or by any district court of appeal, or by any superior

19. Matter of Danford, 157 Cal. 425, 108 Pac. 322, construing In re Delmas, 7 Cal. Unrep. 146, 72 Pac. 402, and saying that the rule therein declared is limited to cases where the accusation is without the sanction of a bar association or responsible public officer and is not applicable to the superior court. This rule is in harmony with rule 26 of the supreme court. In re Delmas, 7 Cal. Unrep. 146, 72 Pac. 402.

20. In re Ashley, 146 Cal. 600, 80 Pac. 1030.

1. In re Delmas, 7 Cal. Unrep. 146, 72 Pac. 402.

2. In re Ashley, 146 Cal. 600, 80 Pac. 1030; In re Delmas, 7 Cal. Unrep. 146, 72 Pac. 402.

3. In re Seale, 31 Cal. App. 144, 159 Pac. 1065; Baird v. Justices' Court, 11 Cal. App. 439, 105 Pac. 259.

court of the state, for either of the following causes, arising after his admission to practice:

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence;

2. Willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counselor;

3. Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding;

4. Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor;

5. For the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise, and whether the same shall constitute a felony or misdemeanor or not; and in the event that such act shall constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from practice therefor."[4]

In California, an attorney cannot be disbarred or suspended for any ground other than those enumerated in the code section just quoted,[5] for the legislature has the power to regulate the causes for which a disbarment or suspension of an attorney may be had, and the courts are bound by this regulation and the limitation it imposes. Where the legislature specifies the acts for which an attorney may be disbarred or suspended, the court is not authorized to act for other causes.[6]

§ 119. Misconduct Toward Court.—One of the principal duties of an attorney at law is to respect and uphold the

4. Code Civ. Proc., § 287. It should be noted that subdivision 5 of this section was added by Stats. 1911, p. 848.

5. In re McCowan, 177 Cal. 93, 170 Pac. 1100; In re Collins, 147 Cal. 8, 81 Pac. 220.

6. In re Collins, 147 Cal. 8, 81 Pac. 220. See 1 Cal. Law Rev. 462, for criticism by O. K. McMurray of a contrary Oklahoma decision.

dignity of the courts,[7] and to refrain from unjust criticism of their motives and decisions.[8] In view of this duty and of the code provision that an attorney may be disbarred or suspended for "any violation of the oath taken by him or of his duties as . . . attorney and counselor,"[9] it has been held that an attorney may be disbarred or suspended for the publication of false and malicious charges against a judge with a view of influencing his action in a pending case,[10] or for the unwarranted publication of a criticism of a judge and of his conduct in trying litigation.[11] Similarly an attorney may be disbarred for filing an affidavit charging several judges, various members of the bar, and other persons with confederating in a wicked and criminal conspiracy,[12] and for filing a brief in an appellate court falsely attacking a judge thereof and threatening the court.[13] Disrespect to a court is ample ground for disbarment, especially when neither justification, withdrawal, mitigation nor excuse is proferred by the accused,[14] or where he offers no apology or excuse, but in answering disbarment proceedings reiterates his former assertions and language and boldly contends that it is unobjectionable and contains nothing which he has not the right to say.[15]

§ 120. Perversion of Justice.—Acts of an attorney tending to a perversion of justice are clearly grounds for disbarment or suspension in California. Thus an attor-

7. See supra, § 19.

8. See supra, § 20.

9. Code Civ. Proc., § 287, subd. 2 (see supra, § 118).

10. In re Collins, 147 Cal. 8, 81 Pac. 220.

11. Matter of Humphrey, 174 Cal. 290, 163 Pac. 60; In re Collins, 147 Cal. 8, 81 Pac. 220 (distinguishing the right of the attorney to indulge in fair criticism and to prefer legal charges against the judge).

12. Bar Association of San Francisco v. Philbrook, 35 Cal. App. 460, 170 Pac. 440.

13. In re Philbrook, 105 Cal. 471, 45 Am. St. Rep. 59, 38 Pac. 511, 884 (suspension).

14. Bar Association of San Francisco v. Philbrook, 35 Cal. App. 460, 170 Pac. 440.

15. In re Philbrook, 105 Cal. 471, 45 Am. St. Rep. 59, 38 Pac. 511, 884.

ney may be removed or suspended for encouraging the commencement of proceedings which he knows, or has reason to suspect, are illegal or unjust,[16] for advising and assisting in a violation of the federal Bankruptcy Act in order to give one creditor an illegal preference,[17] for willfully concealing from the court material facts with regard to an action,[18] or for appearing as guardian ad litem for infants without an order of appointment.[19] The making of a false affidavit is frequently relied upon as ground for disbarment or suspension.[20] Where an affidavit of the attorney is false, the question is not whether the court has been actually misled thereby, but whether it was made for the purpose of deceiving the court.[1] In this connection it has been observed that it is always somewhat dangerous to swear to the "legal effect" of a matter in the form of a positive averment.[2] Such affidavits are often simply impositions upon the court.[3] It is certainly less hazardous to give the language of a written instrument or, if the instrument is lost or beyond the affiant's control, to state that the exact language is not remembered and to give the substance of the language.[4] Again, it is ground for disbarment that an attorney has prepared a complaint and advised his client to verify it which contains allegations known to be false,

16. In re Stephens, 77 Cal. 357, 19 Pac. 646.

17. In re Naphtaly, 7 Cal. Unrep. 378, 14 Cent. L. J. 96 (suspension).

18. In re Biaggi, 36 Cal. App. 650, 172 Pac. 1130.

19. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

20. In re Wharton, 114 Cal. 367, 55 Am. St. Rep. 72, 46 Pac. 172 (service of process); In re Knott, 71 Cal. 584, 12 Pac. 780, (patent proceeding); In re Houghton, 67 Cal. 511, 8 Pac. 52 (denying application for disbarment under the particular facts); In re Hittson, 30 Cal. App. Dec. 125, 185 Pac. 308 (attachment; qualification as surety).

1. In re Houghton, 67 Cal. 511, 8 Pac. 52.

2. In re Knott, 71 Cal. 584, 12 Pac. 780; In re Houghton, 67 Cal. 511, 8 Pac. 52.

3. In re Knott, 71 Cal. 584, 12 Pac. 780.

4. In re Houghton, 67 Cal. 511, 8 Pac. 52.

and has caused his client to verify it, after pretending to correct the misstatement.[5]

§ 121. Misconduct Toward Client.—An attorney may, of course, be disbarred or suspended for misconduct toward his client which shows his unfitness to practice law. Thus, where an attorney is employed to collect money for his client from third persons, he may be removed or suspended for failing to pay it to the client,[6] for appropriating it to his own use,[7] or for embezzling it.[8] Similarly, where an attorney is intrusted with the funds of his client to be used for certain purposes, he may be disbarred for retaining or embezzling them.[9] Again, an attorney may be disbarred for inducing a client to pay him money under the false claim that he is admitted to practice in the federal courts,[10] or for using false representations to induce his client, the administratrix of the estate of a deceased, to deliver to him money belonging to the estate, for appropriating it to his own use, and for refusing to pay it over upon demand and order of the probate court.[11] It is clearly ground for disbarment or suspension that an attorney has assumed a position adverse to his client,[12] or has defended one who is accused of crime after encouraging his prosecution and without a change in belief as to his guilt or innocence.[13] Indeed, it has been held that a city attorney, whose term of office

5. People v. Pearson, 55 Cal. 472.

6. In re Burris, 101 Cal. 624, 36 Pac. 101; In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169 (suspension); Bar Association v. Cantrell, 33 Cal. App. Dec. 310, 193 Pac. 598; In re Bar Association v. McClellan, 40 Cal. App. 630, 181 Pac. 231 (delay in informing the client of collections was held blameworthy).

7. In re Treadwell, 67 Cal. 353, 7 Pac. 724.

8. In re Moore, 72 Cal. 359, 13 Pac. 885.

9. In re Moore, 72 Cal. 359, 13 Pac. 885 (embezzlement); In re Hittson, 30 Cal. App. Dec. 125, 185 Pac. 308 (retention).

10. Matter of Danford, 157 Cal. 425, 108 Pac. 322.

11. In re Burris, 101 Cal. 624, 36 Pac. 101.

12. In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169 (suspension).

13. In re Stephens, 84 Cal. 77, 24 Pac. 46; In re Stephens, 77 Cal. 357, 19 Pac. 646.

has expired, may be suspended for accepting a retainer upon the understanding that he will not allow himself to be retained again by the city.[14] An attorney may also be disbarred for a violation of the confidence of the client in the management of his business affairs.[15]

§ 122. Character and General Conduct.—It is agreed that an attorney may be disbarred, not only for professional misconduct,[16] but also for such misconduct outside his profession as shows him to be so wanting in integrity and trustworthiness that the legal business of others cannot safely be intrusted to him.[17] The right of the courts to exclude attorneys for loss of moral character, malpractice or offenses not punishable as a crime is established beyond all question, for the right to practice law is subject to the condition that the attorney shall possess a blameless moral character, and it is forfeited upon a breach of that condition. The public have a right to demand that no person shall be permitted to aid in the administration of justice whose character is tainted with dishonesty, corruption, crime or disloyalty or treasonable acts.[18] Nevertheless, since the admission of an attorney is in the nature of a judgment that he possessed the requisite qualifications when the order was made,[19] it follows that the judgment, while it continues in force, is an adjudication determinative of the fact that the attorney was of "good moral character" when he was admitted, and an attack on his previous character cannot be made the basis of an order for his removal.[20]

14. In re Cowdery, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47.

15. In re Soale, 31 Cal. App. 144, 159 Pac. 1065.

16. See supra, §§ 119–121.

17. Matter of Haymond, 121 Cal. 385, 53 Pac. 899.

18. Cohen v. Wright, 22 Cal. 293. Extensive quotation from this case is contained in the recent opinion of the supreme court of Pennsylvania, In re Margolio, 112 Atl. Rep. 478, wherein the name of the respondent was ordered to be stricken from the roll of attorneys for violation of his duties as a lawyer and the oath which he took to support the constitution of his state and of the United States.

19. See supra, § 15.

20. Case of Lowenthal, 61 Cal. 122.

As a general rule, it may be said that an attorney is guilty of misconduct whenever he so acts as to be unworthy of the trust and confidence involved in his official oath, and is found to be wanting in that honesty and integrity which must characterize members of the bar in the performance of their professional duties.[1] Several miscellaneous acts of misconduct have been regarded as grounds for disbarment, such as duelling,[2] receiving money in payment of a fee knowing that the same has been stolen,[3] giving a worthless surety in an appeal against a judgment,[4] advertising "divorce, probate and criminal law my specialties,"[5] or committing improprieties in a trial, including the use of abusive and offensive language.[6]

§ 123. Acts not Justifying Disbarment.—Not every reprehensible transaction will be ground for disbarring an attorney,[7] for the court is limited to those grounds declared by the statute.[8] The fact that most attorneys would scorn to act in a certain manner does not make such action a ground for disbarment,[9] for the court in disbarment proceeding is not trying a question of taste.[10] Thus an attorney will not be removed because he has acted as broker for the sale to a newspaper of a confession of murder,[11] because he has offered a large sum

1. Matter of Humphrey, 174 Cal. 290, 163 Pac. 60. Quoting 2 Thornton on Attorneys at Law, p. 1187.

2. Cohen v. Wright, 22 Cal. 293 (citing Smith v. State, 1 Yerg. (9 Tenn.) 228.

3. In re Morton, 179 Cal. 510, 177 Pac. 453.

4. In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169 (suspension).

5. In re Biaggi, 36 Cal. App. 650, 172 Pac. 1130.

6. In re McCowan, 177 Cal. 93, 170 Pac. 1100 (suspension of district attorney).

7. Matter of Haymond, 121 Cal. 385, 53 Pac. 899.

8. See supra, § 118.

9. In re Collins, 147 Cal. 8, 81 Pac. 220 (representing apparently adverse interests); Matter of Haymond, 121 Cal. 385, 53 Pac. 899 (acting as broker to sell confession).

10. Matter of Haymond, 121 Cal. 385, 53 Pac. 899.

11. Matter of Haymond, 121 Cal. 385, 53 Pac. 899. The court directed attention to the fact that the attorney accused was not at-

to an expert to testify that a writing was a forgery where the attorney thought the expert so believed, although he had expressed doubt,[12] or because he has made false statements in his private capacity to obtain the payment of a deposit by a savings bank.[13] It is not ground for disbarment that an attorney has made a motion which is not supported by the facts of the case,[14] or that he has practiced law while occupying a judicial position.[15] Similarly, it is not ground for disbarment that an attorney has obtained a fee from a guardian who had not in fact been authorized to pay it if the attorney believed in good faith that the order would be granted when presented in proper form.[16] Neither is it ground for disbarment that the attorney represented an administrator of an estate and also a creditor thereof, in the absence of accusations that the interests were antagonistic in fact, that the attorney acted from corrupt motives, and that injury was sustained by the parties to the litigation.[17] An attorney for an insolvent will not be disbarred for accepting payment in advance, for removing the pages of a private memorandum-book of the insolvent, or for overlooking the fact that he is also attorney for certain small creditors.[18] Even under subdivision 5 of section 282 of the Code of Civil Procedure, moral turpitude cannot be predicated upon errors of judgment as to the law, or acts done by an attorney in his employ before the accused was admitted to the bar.[19]

torney for the alleged murderer; and that there was no conspiracy to secure the confession.

12. In re Barnes, 2 Cal. Unrep. 847, 16 Pac. 896. See comment on this case in 3 Cal. Law Rev. 47-49.

13. In re Collins, 147 Cal. 8, 81 Pac. 220.

14. Fletcher v. Daingerfield, 20 Cal. 427 (decided under act of March 2, 1859).

15. Baird v. Justice's Court, 11 Cal. App. 439, 105 Pac. 259, citing In re Silkman, 88 App. Div. 102, 84 N. Y. Supp. 1025.

16. In re Kowalsky, 4 Cal. Unrep. 377, 35 Pac. 77.

17. In re Collins, 147 Cal. 8, 81 Pac. 220.

18. In re Luce, 83 Cal. 303, 23 Pac. 350.

19. In re Kling, 30 Cal. App. Dec. 554, 186 Pac. 152.

§ 124. Mitigating Circumstances.—In a proceeding for disbarment based upon a record of conviction for a crime,[20] the judgment which must be pronounced is one of absolute and final disbarment, while in other cases the judgment may be according to the gravity of the offense charged, and may consist in deprivation of the right to practice permanently or for a limited period.[1] In fixing the penalty to be imposed, the court may properly take into account the motives and purposes which actuated the accused.[2] The court may also consider in mitigation of an attorney's offense the fact that the attorney's practice has been virtually suspended during the pendency of disbarment proceedings, that he has hitherto borne an excellent reputation; that in view of his sensitive nature, he has already been sufficiently punished, and that a petition on his behalf has been signed by a large number of the bench and bar of his county.[3] Where the attorney has changed sides in a case, the court will consider in mitigation the fact that he undertook to obtain the punishment of one whom he thought had deserted his brother, and later, upon finding that there had been no desertion, came to his defense.[4] So, also, where the misconduct consists primarily in impropriety and is committed without desire for pecuniary profit, the court may consider in mitigation that the misconduct has arisen rather from ignorance of fundamental legal ethics and from a mistaken and excessive zeal than from a deliberate intention to accomplish evil ends.[5] A disbarment proceeding will be dismissed where the fault, though a grave one, is due to youth, inexperience and ignorance.[6]

20. See infra, §§ 125–129.

1. Code Civ. Proc., § 299; In re Riccardi, 59 Cal. Dec. 478, 189 Pac. 694. See infra, § 137.

2. In re McCowan, 177 Cal. 93, 170 Pac. 1100.

3. In re Stephens, 84 Cal. 77, 24 Pac. 46.

4. In re Stephens, 84 Cal. 77, 24 Pac. 46.

5. In re McCowan, 177 Cal. 93, 170 Pac. 1100.

6. In re Knott, 71 Cal. 584, 12 Pac. 780 (filing of false affidavit).

Conviction of Crime.

§ 125. In General.—The first ground stated in the code for the removal or suspension of an attorney is "his conviction of a felony or misdemeanor involving moral turpitude."[7] It will be remembered that section 17 of the Penal Code segregates crimes into felonies and misdemeanors in order to draw a distinction between crimes of the greater and crimes of the lesser magnitude. But the provision of the Code of Civil Procedure just quoted makes no distinction between the two grades of offense. It is all-inclusive of crimes, and is to be read as if it provided in terms for the removal of an attorney for the "conviction of any crime involving moral turpitude," for such is its legal effect.[8] The provision is limited, however, to prosecutions for a criminal offense as defined by the California statute and in which the judgment finally determines for all purposes the question of guilt or innocence of the accused of that crime. Hence, it does not include proceedings for the removal of public officers under section 758 et seq. of the Penal Code.[9] Disbarment following the conviction of a crime is not an "incident" of the conviction in the sense that such conviction ipso facto removes the attorney from his office, or is a part of the penalty prescribed by the law for the offense of which he has been convicted. It is a separate and independent thing.[10] Nevertheless, where an attorney has been convicted of a felony and is in jail pending an appeal, it is not possible for him to appear in court in the interests of his clients, and although he has not been suspended or disbarred, the superior court has an inherent power to refuse to allow him to appear on behalf

7. Code Civ. Proc., § 287, subd. 1 (see supra, § 118).

8. In re Thompson, 37 Cal. App. 344, 174 Pac. 86 (holding that the crimes denounced by section 5470 of the Revised Statutes of the United States are included whenever they involve moral turpitude).

9. In re Reid, 182 Cal. 88, 187 Pac. 7.

10. In re Riccardi, 59 Cal. Dec. 478, 189 Pac. 694.

of another person charged with crime or to appear as an attorney for any purpose that will involve a subsequent appearance in the same matter for the regular and orderly disposition of the case.[11]

§ 126. Crimes Involving Moral Turpitude.—While conviction for crime is ground for disbarment whether the offense be a felony or a misdemeanor,[12] it is expressly required by the code that the offense be one "involving moral turpitude."[13] In this connection it has been said that moral turpitude is misconduct by an attorney in reference to his duties and obligations as such attorney,[14] conduct, in fact, which is contrary to justice, honesty, modesty and good morals.[15] If the actual commission of an offense involves moral turpitude, then an attempt to commit that offense involves moral turpitude,[16] and so does a conspiracy to commit it.[17] It has been held in California, with reference to disbarment proceedings, that an attorney commits an offense involving moral turpitude when he smuggles opium into the United States,[18] or receives currency from one who has stolen it from the mails and conceals and aids in its concealment,[19] or when

11. Pedersen v. Superior Court, 149 Cal. 389, 86 Pac. 712 (denying petition for writ of mandamus compelling the superior court to allow the attorney to defend the petitioner against a criminal charge).

12. See supra, § 125.

13. Code Civ. Proc., § 287, subd. 1 (see supra, § 118).

14. Matter of Humphrey, 174 Cal. 290, 163 Pac. 60.

15. In re O'Connell, 61 Cal. Dec. 8, 194 Pac. 1010 (also defining moral turpitude as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man"); Matter v. Humphrey, 174 Cal. 290, 163 Pac. 60; Matter of Coffey, 123 Cal. 522, 56 Pac. 448; In re Cruickshank, 32 Cal. App. Dec. 252, 190 Pac. 1038; In re Thompson, 37 Cal. App. 344, 174 Pac. 86.

16. Matter of Coffey, 123 Cal. 522, 56 Pac. 448.

17. In re Shepard, 35 Cal. App. 492, 170 Pac. 442.

18. In re Shepard, 35 Cal. App. 492, 170 Pac. 442 (where Works, J., pro tem., discusses the characteristics of smuggling and the effects of opium).

19. In re Thompson, 37 Cal. App. 344, 174 Pac. 86. See, also, In re Crane, 59 Cal. Dec. 503, 189 Pac.

he willfully engages in a conspiracy having for its definite purpose the obstruction of the recruiting or enlistment of soldiers in war time.[19a] Furthermore, it may be noted that extortion is a crime against property and an act inherently bad and vicious, and is therefore an offense involving moral turpitude. It is classed in the code in the company of arson, burglary, counterfeiting and embezzlement, and by the company it keeps it must be judged.[20]

§ 127. Commission or Conviction Outside California.— To disbar an attorney on the ground that he has been convicted of a crime involving moral turpitude, it is not essential that the crime shall have been committed in California,[1] or that the conviction shall have been by a California court.[2] A crime committed by a California lawyer in Nevada or Massachusetts is just as bad, involves as high a degree of moral turpitude, affects as greatly the desirability of his retention in the legal profession, as if the same crime were committed in California. Imaginary lines on the surface of the globe do not affect the character of acts done to the north or south or to the east or west of them. There is, it has been said, something essentially unjust in the idea that a California lawyer committing a crime within the state may be put beyond the pale of the profession by summary proceeding while one of his brethren committing the same or a worse crime immediately beyond the Nevada border or in a vessel at sea immediately outside the three-mile limit on the California coast may not be re-

1072, where an attorney convicted of using the mails to defraud was disbarred.

19a. In re O'Connell, 61 Cal. Dec. 8, 194 Pac. 1010.

20. Matter of Coffey, 123 Cal. 522, 56 Pac. 448.

1. In re Shepard, 35 Cal. App. 492, 170 Pac. 442.

2. Barnes v. District Court of Appeal, 178 Cal. 500, 173 Pac. 1100; In re Thompson, 37 Cal. App. 344, 174 Pac. 86; In re Shepard, 35 Cal. App. 492, 170 Pac. 442.

moved in like manner.[3] The reasons which induced the legislature to prescribe conviction for a crime involving moral turpitude as a ground for disbarment are as potent when applied to a conviction in a court of another state, or in a court of the United States, as when applied to a conviction in the courts of this state. It was not because of the particular court which adjudges the attorney guilty, or the place where it sits, that the legislature saw fit to make that a cause for disbarment, but because of the bad moral character of such attorney, which the legislature deemed was conclusively proved by such record of conviction.[4]

§ 128. Necessity for Criminal Proceedings. — Prior to 1911, the rule was well established in California that a court would not hear disbarment proceedings based on the commission of a crime until after the conclusion of the regular proceedings in the courts having jurisdiction of the offense.[5] This rule was particularly applicable where the accuser had also an undoubted right to recover from the attorney in a civil action.[6] It had no application, however, where the criminal act committed constituted a violation of the attorney's professional duty.[7] The power of the court to disbar the offending attorney for such an offense was not suspended until after his conviction, although the court might in its discretion

3. In re Shepard, 35 Cal. App. 492, 170 Pac. 442, per Works, J., pro tem.

4. Barnes v. District Court of Appeal, 178 Cal. 500, 173 Pac. 1100, per Shaw, J.

5. In re Wells, 174 Cal. 467, 163 Pac. 657; Matter of Danford, 157 Cal. 425, 108 Pac. 322; In re Collins, 147 Cal. 8, 81 Pac. 220; Matter of Haymond, 121 Cal. 385, 53 Pac. 899; Ex parte Tyler, 107 Cal. 78, 40 Pac. 33; In re Stephens, 102 Cal. 264, 36 Pac. 586; In re Tilden, 3 Cal. Unrep. 383, 25 Pac. 687; In re Tilden, 3 Cal. Unrep. 383, 25 Pac. 687.

6. In re Delmas, 7 Cal. Unrep. 146, 72 Pac. 402; In re Stephens, 102 Cal. 264, 36 Pac. 586; In re Tilden, 3 Cal. Unrep. 383, 25 Pac. 687.

7. Matter of Danford, 157 Cal. 425, 108 Pac. 322; In re Wharton, 114 Cal. 367, 55 Am. St. Rep. 72, 46 Pac. 172; Ex parte Tyler, 107 Cal. 78, 40 Pac. 33; In re Treadwell, 67 Cal. 353, 7 Pac. 724.

withhold the exercise of this power as the facts of any particular case might suggest as appropriate.[8] In the exercise of this power the court dealt with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he was a fit person to be allowed to continue to practice as an attorney and counselor in the courts under the license which had been granted to him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished.[9]

In 1911, a fifth subdivision was added to section 287 of the Code of Civil Procedure, providing, among other things, that an attorney may be disbarred "for the commission of any act involving moral turpitude, dishonesty or corruption," and that "in the event that such act shall constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension therefor."[10] Since the adoption of this amendment in 1911, it is no defense that the act complained of was committed in a capacity other than that of attorney and that there has been no conviction therefor; though this is still a defense as to acts committed in 1910 or prior thereto.[11]

§ 129. **Effect of Appeal, Acquittal or Pardon.**—It is the settled rule in California that if the attorney has appealed from a judgment of conviction, the judgment is not the final conviction against the attorney which the law contemplates in order to justify his removal.[12] This rule

8. Ex parte Tyler, 107 Cal. 78, 40 Pac. 33.

9. Ex parte Tyler, 107 Cal. 78, 40 Pac. 33; In re Treadwell, 67 Cal. 353, 7 Pac. 724.

10. See supra, § 118.

11. In re Soale, 31 Cal. App. 144, 159 Pac. 1065.

12. In re Riccardi, 59 Cal. Dec. 478, 189 Pac. 694 (where appeal was from the superior court to the district court of appeal. Olney and Lawlor, JJ., dissented on the ground that the earlier decisions establishing this rule were erroneous and should be overruled); McKannay v. Horton, 151 Cal. 711, 121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661,

was originally rested on the ground that an appeal operates as a suspension of the judgment of the lower court for all purposes.[13] This theory was criticised in a later case, where the rule was rested on the doctrine that the public is not interested in depriving the attorney of the right to practice his profession in the service of those who choose to employ him until it has finally been determined that he is unfit for the profession.[14] In a recent case it was said that this construction of the word "conviction," as used in the provisions relating to disbarment, has been accepted by the legislature and by the people of the state for thirty-five years, and to now adopt a different construction would savor of the enactment of judicial legislation. It may freely be conceded that it would be advisable to provide for the suspension of an attorney convicted of a crime pending appeal, but that is a question solely for the legislative department of the state.[15]

The question has been raised, but not decided, as to whether an attorney may be disbarred for the commission of a crime for which he has been acquitted.[16] In this connection it has been said that it will be time enough to decide whether the court may disbar an attorney notoriously guilty of some infamous crime but acquitted of the charge through some scandalous miscarriage of justice when the question arises.[17]

In a proceeding to disbar an attorney upon the sole ground of his previous conviction of a felony, an objec-

91 Pac. 598 (upholding the rule as applied to attorneys, but refusing to apply it to public officers, such as a mayor); People v. Treadwell, 66 Cal. 400, 5 Pac. 686 (where appeal was from justice's court to the superior court).

13. People v. Treadwell, 66 Cal. 400, 5 Pac. 686.

14. McKannay v. Horton, 151 Cal. 711, 121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661, 91 Pac. 598.

15. In re Riccardi, 59 Cal. Dec. 478, 189 Pac. 694, per Angellotti, C. J.

16. Ex parte Tyler, 107 Cal. 78, 40 Pac. 33; In re Tilden, 3 Cal. Unrep. 383, 25 Pac. 687; In re Tilden, 3 Cal. Unrep. 383, 25 Pac. 687.

17. In re Tilden, 3 Cal. Unrep. 383, 25 Pac. 687.

tion that the conviction was subsequently annulled and set aside by a pardon issued by the governor of the state for the offense set forth in the judgment of conviction should be sustained, for a pardon releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. This rule is subject to the limitation, however, that an attorney may be disbarred for acts of a felonious nature, where a pardon has followed the conviction of a crime, if disbarment is asked on the more general ground that the attorney is a person unfit to practice law, for a pardon does not restore one's good moral character.[18]

Proceedings.

§ 130. In General. — Proceedings on an accusation against an attorney are prescribed by sections 287 to 297 of the Code of Civil Procedure. These sections outline a complete scheme, covering the details of charge, process, plea, trial and judgment. The courts have uniformly treated disbarment proceedings as peculiar to themselves, and governed exclusively by the code sections specifically covering them. It may also be observed that proceedings in disbarment partake strongly of the nature of criminal proceedings,[19] and are in almost all respects dissimilar to the procedure provided for civil actions.[20] In this connection it may be noted that the accuser of an attorney

18. Matter of Emmons, 29 Cal. App. 121, 154 Pac. 619; Matter of Danford, 157 Cal. 425, 108 Pac. 322.

19. In re Morton, 179 Cal. 510, 177 Pac. 453; In re McCowan, 177 Cal. 93, 170 Pac. 1100; In re Collins, 147 Cal. 8, 81 Pac. 220; Matter of Haymond, 121 Cal. 385, 53 Pac. 899; Fletcher v. Daingerfield, 20 Cal. 427; People v. Turner, 1 Cal. 143, 52 Am. Dec. 295; In re Alameda County Bar Assn., 35 Cal. App. 534, 170 Pac. 432. See, however, Philbrook v. Newman, 85 Fed. 139, where it is said that disbarment proceedings in California are civil in nature.

20. Matter of Danford, 157 Cal. 425, 108 Pac. 322.

has no right to have a disbarment proceeding dismissed,[1] and has no right to appeal following dismissal.[2]

Limitation of action.—It is an established rule that a proceeding for the disbarment of an attorney is not barred by the statute of limitations.[3] The fullest opportunity should be given to investigate the conduct of an attorney who is charged with a violation of his duties as such; and while the court may not be willing to disbar or suspend an attorney if it appears that there has been unreasonable delay in the presentation of the charges, so that a fair opportunity cannot be had for procuring the witnesses and meeting the accusation, it cannot be said, as a matter of law, that an accusation is barred either by the express terms of the statute of limitations or by analogy.[4] Nevertheless, the court will not encourage stale charges—those which, by their age, have passed from the memory of men—especially in a case where the conduct of the attorney has been exemplary in recent times.[5]

§ 131. Initiation of Proceedings.—Section 289 of the Code of Civil Procedure provides that proceedings to remove or suspend an attorney on the ground of a conviction of a crime involving moral turpitude "must be taken by the court on the receipt of a certified copy of the record of conviction," and that proceedings on other grounds "may be taken by the court for the matters within its knowledge, or may be taken upon the information of another."[6] Where proceedings are based on an

1. In re Knott, 71 Cal. 584, 12 Pac. 780.

2. Matter of Danford, 157 Cal. 425, 108 Pac. 322; In re Thompson, 5 Cal. Unrep. 414, 45 Pac. 1034.

3. Matter of Danford, 157 Cal. 425, 108 Pac. 322; Ex parte Tyler, 107 Cal. 78, 40 Pac. 33; In re Lowenthal, 78 Cal. 427, 21 Pac. 7; United States v. Parks, 93 Fed. 414.

4. In re Lowenthal, 78 Cal. 427, 21 Pac. 7.

5. United States v. Parks, 93 Fed. 414 (approving the rule of the California cases).

6. The present wording of this section does not entirely correspond to the statement given in the text, for the reason that although the section states the grounds of disbarment by reference to the sub-

attorney's conviction of a crime involving moral turpitude they are governed by section 288, which reads as follows:

"In case of the conviction of an attorney or counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction."[7]

Although an attorney may be disbarred for a crime committed or for a conviction adjudged outside California,[8] it must be observed that section 288 applies only to crimes committed in California and to convictions in the California courts.[9] The legislature would have no authority to require the clerk of a court in another state, or of a court of the United States sitting in this state, to perform any act whatever, and the scope of that section must therefore be confined to the officials of this state.[10]

Where proceedings are based on other grounds than criminal conviction, a verified accusation is required by sections 290 and 291 of the Code of Civil Procedure.[11] No accusation is necessary, however, when proceedings are based on conviction for a crime involving moral turpitude, for sections 290 and 291 of the Code of Civil Procedure refer only to the provision of section 289 on that subject, and that provision applies exclusively to proceedings under the second, third and fourth subdivisions of section 287 and not to subdivision 1.[12]

§ 132. Requirement of Notice.—In reference to the necessity of notice to the accused attorney of proceedings for disbarment, it has been said that under the Code

divisions of section 287 of the Code of Civil Procedure, it has not been amended since the addition of the fifth subdivision in 1911.

7. Code Civ. Proc., § 288.

8. See supra, § 127.

9. Barnes v. District Court of Appeal, 178 Cal. 500, 173 Pac. 1100; In re Shepard, 35 Cal. App. 492, 170 Pac. 442.

10. Barnes v. District Court of Appeal, 178 Cal. 500, 173 Pac. 1100.

11. See infra, §§ 133, 134.

12. Barnes v. District Court of Appeal, 178 Cal. 500, 173 Pac. 1100.

of Civil Procedure, proceedings for removal or suspension are divided into two classes. The first of these includes, alone, proceedings based upon convictions of felonies or misdemeanors involving moral turpitude. The second class includes two subclasses,—first, those proceedings to be taken for matters within the knowledge of the court, and, second, those which may be taken upon the information of another. Whether notice is required in proceedings under both subclasses of the second class or whether it is not, it is clear that no notice is required in proceedings of the first class. In such proceedings, the record of conviction is conclusive evidence; and no notice is required by section 292 of the Code of Civil Procedure, which provides with particularity for notice in certain cases.[13] Consequently, it has been held that an attorney at law can be removed or suspended upon the record of a foreign court convicting him of a crime involving moral turpitude, without notice and without giving him an opportunity to be heard or to answer to the sufficiency of the record or to deny the allegations therein contained.[14]

Where an attorney is proceeded against for disbarment on other grounds than criminal conviction, it seems that he is entitled to have notice of the charges against him and an opportunity to make his defense.[15] This is not only the dictate of natural justice and the uniform practice in such cases, but is a right especially recognized by adjudication,[16] and by a provision of the Code of Civil Procedure.[17] A judgment of disbarment cannot be sup-

13. In re Shepard, 35 Cal. App. 492, 170 Pac. 442, per Works, J., pro tem.

14. In re Thompson, 37 Cal. App. 344, 174 Pac. 86; In re Shepard, 35 Cal. App. 492, 170 Pac. 442.

15. Fletcher v. Daingerfield, 20 Cal. 427; People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

16. People v. Turner, 1 Cal. 143, 52 Am. Dec. 295 (referring to Ex parte Heyfron, 7 How. (8 Miss.) 127).

17. Code Civ. Proc., § 292, providing that where proceedings are by accusation, a copy of the order requiring the accused to appear and answer and of the accusation shall

ported where no notice is given of the charges upon which the order is made; no opportunity for explanation, apology or defense afforded; and judgment is ex parte, condemning the defendant without a hearing.[18] Notice or citation is certainly sufficient if the accused appears before the court and makes answer to the charges against him.[19]

§ 133. Pleadings Generally.—The Code of Civil Procedure provides that

"If the proceedings are upon the information of another, the accusation must be in writing."[20]

and, furthermore, that "the accusation must state the matters charged."[1] These provisions are not applicable, however, where disbarment is sought on the ground of criminal conviction,[2] for in such cases the proceedings are taken on the certified copy of the record of conviction.[3] The rule is well established in California that all the intendments of an accusation for disbarment are in favor of the accused, and that the accusation is not sufficient if, all its statements being true, the accused could be innocent.[4] This is in harmony with the general doctrine that disbarment proceedings partake strongly of the nature of a criminal prosecution.[5] Nevertheless, the federal court has said that under the California rule, charges against an attorney need not be presented with the same particularity and formality as is ordinarily re-

be served on the accused at least five days before the day appointed in the order, and also providing for service by publication in certain cases. See, also, Code Civ. Proc., § 293, providing that if the accused does not appear at the time appointed, the court may determine the accusation in his absence.

18. People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

19. Philbrook v. Newman, 85 Fed. 139.

20. Code Civ. Proc., § 290.

1. Code Civ. Proc., § 291.

2. Barnes v. District Court of Appeal, 178 Cal. 500, 173 Pac. 1100.

3. Code Civ. Proc., § 289 (see supra, § 131).

4. In re Collins, 147 Cal. 8, 81 Pac. 220; Matter of Haymond, 121 Cal. 385, 53 Pac. 899; In re Alameda County Bar Assn., 35 Cal. App. 534, 170 Pac. 432.

5. See supra, § 130.

quired in criminal actions.[6] When the facts stated in an accusation for the disbarment of an attorney show misconduct on his part as an attorney sufficient to put him upon his trial, a demurrer to the accusation will not be sustained upon the ground that the facts are stated in narrative form, without any allegations connecting them with one or the other of the general charges of misconduct.[7]

As to the pleadings on the part of the accused, the code contains the following provisions:

"The accused may answer to the accusation either by objecting to its sufficiency or denying it."[8]

"If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes."[9]

"If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court."[10]

§ 134. Verification of Accusation.—The accusation against the attorney must be verified,[11] for the code provides that

"The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true."[12]

The section does not require that the accusation shall be made by any particular person, but only by "some person," and when such an accusation is preferred by a quasi-public body, such as a bar association, or by some

6. Philbrook v. Newman, 85 Fed. 139.

7. In re Lowenthal, 78 Cal. 427, 21 Pac. 7.

8. Code Civ. Proc., § 294.

9. Code Civ. Proc., § 295.

10. Code Civ. Proc., § 296.

11. In re Herrick, 56 Cal. Dec. 431, 176 Pac. 165; In re Collins, 147 Cal. 8, 81 Pac. 220; In re Hudson, 102 Cal. 467, 36 Pac. 812; In re Hotchkiss, 58 Cal. 39.

12. Code Civ. Proc., § 291.

other public officer whose duty it is to proceed in such matters in the public interest, it is not contemplated or necessary that the verification should be made by a member of the committee acting for such association, or by such public officer. It is sufficient if the accusation so presented be verified by some person who swears to the truth of the charges set forth in it. Such person is to be deemed the accuser, although the charges are presented, and the prosecution conducted, on behalf of the bar association or of the public.[13] The verification of an accusation against an attorney may not be made by the attorney of the informants without stating that the facts are within his knowledge or any other reason why he makes it.[14] An accusation upon information and belief, or verified upon affiant's knowledge, except as to matters therein stated on information and belief, is likewise insufficient.[15] On the other hand, the affiant's statement "that he has read the foregoing petition and that the charges therein contained are true" is clearly sufficient, since it follows the language of the statutory requirement.[16] Whether the oath to the accusation is or is not sufficient is to be determined from an inspection of the verification alone, and not from a deposition of the affiant, or from evidence taken in some other ancillary proceeding.[17]

§ 135. **Trial and Evidence.**—The rule is well established that an accused attorney is not entitled to a trial by jury in a proceeding for his disbarment.[18] The stat-

13. In re Collins, 147 Cal. 8, 81 Pac. 220.

14. In re Hotchkiss, 58 Cal. 39.

15. In re Hudson, 102 Cal. 467, 36 Pac. 812.

16. In re Collins, 147 Cal. 8, 81 Pac. 220 (referring to Code Civ. Proc., § 291, and distinguishing In re Hudson, 102 Cal. 467, 36 Pac. 812, and In re Hotchkiss, 58 Cal. 39, where the accusation and verification were expressly stated to be made on information and belief).

17. In re Collins, 147 Cal. 8, 81 Pac. 220.

18. Matter of Danford, 157 Cal. 425, 108 Pac. 322; In re Wharton, 114 Cal. 367, 55 Am. St. Rep. 72, 46 Pac. 172; United States v. Parks, 93 Fed. 414.

ute provides for a trial by the court, and the constitutionality of that provision is beyond question.[19] Indeed, the statute provides that "the court may, in its discretion, order a reference to a committee to take depositions in the matter."[20]

As to the evidence which is admissible, it may be observed that charges against an attorney at law, which, if proven, would not clearly constitute a cause for suspension or removal under the provisions of the code, will not be investigated on proceedings to remove him.[1] Where an attorney is charged with procuring the theft of a paper, the party who lost it cannot testify that the person who stole it said that the accused had hired him to steal it.[2] In a proceeding for the disbarment of an attorney at law for receiving money knowing the same to have been stolen, a conviction can be had upon the testimony of the persons committing the theft, since the attorney and the thief are not accomplices.[3] Section 1110 of the Penal Code, specifying the character of the proof required in order to convict one of false pretenses, has no application to a disbarment proceeding based on this ground.[4]

§ 136. Degree of Proof.—It is always an unpleasant thing to disbar an attorney,[5] and proceedings for disbarment partake of many of the characteristics of criminal actions.[6] In view of these facts, and of the further fact that a judgment of disbarment deprives the attorney of

19. In re Wharton, 114 Cal. 367, 55 Am. St. Rep. 72, 46 Pac. 172, referring to section 297 of the Code of Civil Procedure: "If the accused plead guilty, or refuse to answer the accusation, the court shall proceed to judgment of removal or suspension. If he deny the matters charged, the court shall, at such time as it may appoint, proceed to try the accusation."

20. Code Civ. Proc., § 298.

1. In re Treadwell, 2 Cal. Unrep. 413, 4 Pac. 1192.

2. In re Barnes, 2 Cal. Unrep. 847, 16 Pac. 896.

3. In re Morton, 179 Cal. 510, 177 Pac. 453.

4. In re Cruickshank, 32 Cal. App. Dec. 252, 190 Pac. 1038.

5. Matter of Haymond, 121 Cal. 385, 53 Pac. 899.

6. See supra, § 130.

personal and property rights, it is the rule that disbarment will not be ordered without clear proof of guilt.[7] Where the evidence is substantially conflicting as to the charge of unprofessional conduct against an attorney at law, the attorney accused thereof will be given the benefit of doubts arising from such conflict of evidence,[8] and where the charges are not satisfactorily proven, the proceeding will be dismissed.[9] A strong case must be made out to warrant the disbarment or suspension of an old attorney who has practiced law for more than forty years without any previous stain upon his professional reputation.[10] Nevertheless, a record of conviction of a felony or misdemeanor involving moral turpitude is conclusive evidence of such conviction, and upon the production of such a record, it is the duty of the court to give judgment of disbarment.[10a]

Rule on appeal.—Statements that the evidence must be clear, positive and such as to establish both the motive and commission of the act charged beyond a reasonable doubt are not to be found where an appellate court is reviewing a determination of a lower court which has heard disbarment proceedings, and in such cases the rule is that the accused should not be convicted unless the trial court is convinced by clear and satisfactory evidence or, as said in some cases, beyond a reasonable doubt, of his guilt.[11] It is therefore sufficient to support an order

7. In re Morton, 179 Cal. 510, 177 Pac. 453; In re Houghton, 67 Cal. 511, 8 Pac. 52; In re Cruickshank, 32 Cal. App. Dec. 252, 190 Pac. 1038.

8. In re Stephens, 84 Cal. 77, 24 Pac. 46; In re Bar Association v. McClellan, 40 Cal. App. 630, 181 Pac. 231; In re Alameda County Bar Assn., 35 Cal. App. 534, 170 Pac. 432.

9. In re Knapp, 2 Cal. Unrep. 806, 16 Pac. 520; In re Lowenthal, 2 Cal. Unrep. 300, 3 Pac. 657; People v. Tharp, 2 Cal. Unrep. 123 (where disapproval was by affidavits); People v. Redfield, 2 Cal. Unrep. 120.

10. In re Cobb, 84 Cal. 550, 24 Pac. 293.

10a. In re O'Connell, 61 Cal. Dec. 8, 194 Pac. 1010.

11. In re Morton, 179 Cal. 510, 177 Pac. 453; In re Cruickshank, 32 Cal. App. Dec. 252, 190 Pac. 1038.

of disbarment on appeal that there is evidenced a substantial nature supporting the material allegations on each of the counts on which the judgment is founded.[12] Consequently, where the trial court has found, upon contradictory evidence, that the charges against an attorney have been made out by the evidence beyond a reasonable doubt, its conclusion will not readily be disturbed upon appeal.[13] In disbarment proceedings, as in other cases, a court of review cannot determine the weight to be given conflicting evidence, but such determination is the peculiar and exclusive province of the tribunal wherein the hearing is had.[14] For reasons analogous to these which have always led reviewing courts to treat as conclusive findings of trial courts on conflicting evidence, the supreme court accepts the opinion of the district court of appeal which has heard a disbarment proceeding as a correct determination of the issues of fact.[15]

§ 137. Findings and Judgment.—There is no requirement that the court make written findings of fact and conclusions of law in disbarment proceedings,[16] and such practice is not to be commended.[17] Findings are not prohibited, and when present are properly a part of the record which the appellate court may review.[18] The judgment need not state the grounds of disbarment.[18a]

12. In re Hittson, 30 Cal. App. Dec. 125, 185 Pac. 308.

13. In re Wharton, 114 Cal. 367, 55 Am. St. Rep. 72, 46 Pac. 172.

14. In re Morton, 179 Cal. 510, 177 Pac. 453; Matter of Danford, 157 Cal. 425, 108 Pac. 322; In re Soale, 31 Cal. App. 144, 159 Pac. 1065.

15. In re McCowan, 177 Cal. 93, 170 Pac. 1100.

16. Matter of Danford, 157 Cal. 425, 108 Pac. 322; In re Kling, 30 Cal. App. Dec. 504, 186 Pac. 152; In re Biaggi, 36 Cal. App. 650, 172 Pac. 1130.

17. In re Kling, 30 Cal. App. Dec. 504, 186 Pac. 152.

18. In re Biaggi, 36 Cal. App. 650, 172 Pac. 1130 (citing In re Wharton, 114 Cal. 367, 55 Am. St. Rep. 72, 46 Pac. 172).

18a. Danford v. Superior Court, 33 Cal. App. Dec. 168, 193 Pac. 272. Indeed, the reasons for disbarment are no part of the judgment, and cannot be considered on appeal. In re Cruickshank, 32 Cal. App. Dec. 252, 190 Pac. 1038.

In a proceeding for disbarment based upon the record of conviction for a crime, the judgment which must be pronounced is one of absolute and final disbarment; while in other cases the judgment may be according to the gravity of the offense charged, and may consist in deprivation of the right to practice permanently or for a limited period.[19] An earlier section of this article discusses circumstances which have been held to mitigate the gravity of an attorney's offense,[20] and a later section discusses the right of the court to give an order of indefinite suspension.[1] A portion of an order of disbarment which adjudges the attorney infamous is wholly illegal, for no court can adjudge any man, whether counselor or layman, infamous. It is true, infamy attaches to a conviction of certain public officers; but it is the law, and not the court, which fixes the taint.[2]

§ 138. Order of Indefinite Suspension.—Several cases have raised the question of the validity of an order of suspension for an indefinite time.[3] It was held by the supreme court of California in the only decision in that court which covers the question that in a disbarment proceeding the accused may be suspended for a period not necessarily limited as a fixed and determinate period of time, but for an uncertain time, subject to the right of the accused to relieve himself therefrom by making restitution of a stated amount of money which he had improperly obtained by means of his professional misconduct. In that case the record showed the amount as established by another judgment, and the judgment of suspension was not subject to attack by reason of any

19. Code Civ. Proc., § 299; In re Riccardi, 59 Cal. Dec. 478, 189 Pac. 694.

20. See supra, § 124.

1. See infra, § 138.

2. Fletcher v. Daingerfield, 20 Cal. 427.

3. See In re Tyler, 78 Cal. 307, 12 Am. St. Rep. 55, 20 Pac. 674; In re Soale, 31 Cal. App. 144, 159 Pac. 1065; Philbrook v. Newman, 85 Fed. 139.

uncertainty in the amount which the accused was required to restore.[4] Following this decision, the district court of appeal has held that a judgment suspending an attorney at law for one year "and thereafter until the claim of the accuser is fully paid" may be sustained if the claim of the accused is certain, and not otherwise. Where the claim is uncertain, the order of indefinite suspension is too uncertain to be capable of enforcement, and will be stricken from the judgment.[5] A condition in an order suspending an attorney from practice for the period of five years with the privilege of applying for reinstatement at the end of two years, that if at the end of the two-year period it shall appear to the court that he had directly violated the order or had been guilty of any additional conduct involving moral turpitude, he should be permanently disbarred, is void, as an attempt to prejudice and predetermine matters not before the court at the time of the making of the order.[6] Even if a clause disbarring an attorney "until the further order of the court" is invalid, it may be observed that the balance of the order, disbarring the attorney for a period of years, is valid.[7]

Effect.

§ 139. In General.—Disbarment does not deprive the former attorney of any right, privilege or immunity secured to him by the constitution of the United States.[8] It does not limit the former attorney in the exercise of any rights formerly enjoyed by him, saving those pertaining to the office of attorney at law and growing out

4. In re Soale, 31 Cal. App. 144, 159 Pac. 1065, referring to In re Tyler, 78 Cal. 307, 12 Am. St. Rep. 55, 20 Pac. 674.

5. In re Soale, 31 Cal. App. 144, 159 Pac. 1065.

6. In re Biaggi, 36 Cal. App. 650, 172 Pac. 1130.

7. Philbrook v. Newman, 85 Fed. 139.

8. Philbrook v. Newman, 85 Fed. 139.

of his admission to practice.[9] Since one acts as attorney at law only when he represents another, not when he appears for himself, it follows that a suspended attorney may appear in a suit in which he is himself a party, even if he has acquired his rights by assignment after the action was commenced. In such a case the trial court should satisfy itself that the assignment is not simulated and in evasion of the judgment of disbarment or suspension.[10] Similarly it follows, in the absence of a statute to the contrary, that a disbarred attorney may still practice in the justice courts. In reaching this conclusion the district court of appeal suggested that legislation to prevent this result would be constitutional, appropriate, and desirable.[11] Apparently as a result of this judicial suggestion, the legislature in 1919 added the following provision to section 299 of the Code of Civil Procedure:

"Upon conviction and entry of judgment as hereinabove provided, such attorney shall be precluded from practicing as attorney at law, attorney or agent of another in all justice courts, recorder's courts, police courts and all other courts and tribunals in the state of California; or to hold himself out to the public as an attorney at law, during the time he is by such judgment deprived of the right to practice as attorney or counselor."[12]

§ 140. Relief from Order.—If a judgment of disbarment or suspension by a lower court is irregular or improper, the attorney has his remedy, which is by mandamus,[13] or by appeal,[14] or by certiorari in the nature of

9. Philbrook v. Superior Court, 111 Cal. 31, 43 Pac. 402; Ex parte Hittson, 39 Cal. App. 91, 178 Pac. 149.

10. Philbrook v. Superior Court, 111 Cal. 31, 43 Pac. 402.

11. Ex parte Hittson, 39 Cal. App. 91, 178 Pac. 149.

12. Stats. 1919, p. 140, amending Code Civ. Proc., § 299.

13. See infra, § 143.

14. Case of Lowenthal, 61 Cal. 122. "In all cases where an attorney is removed or suspended by a superior court, the judgment or order of removal or suspension may be reviewed on appeal by the supreme court." Code Civ. Proc., § 287.

a writ of error,[15] or by some other appropriate proceeding.[16] The supreme court has power to transfer to itself for hearing and determination a proceeding for the disbarment of an attorney at law which has been heard and decided by the district court of appeal.[17] Nevertheless, a judgment of the superior court, disbarring an attorney, which has been affirmed by the supreme court, cannot be modified by the latter court after the issuance of the remittitur, but an application for a modification should be made to the superior court.[18] If judgment has been given by the supreme court, a motion for a new trial is not the proper remedy.[19] A writ of error to the federal supreme court does not operate to supersede a judgment of suspension order by the California supreme court, since no process is necessary to the enforcement of that order.[20] There can be no action against the judges who have issued an order of disbarment and the attorneys who have procured it while the judgment of disbarment stands.[1]

It seems that only the attorney is entitled to relief following a disbarment proceeding, for it has been held that the law does not contemplate an appeal by the accuser following a dismissal,[2] and that a client is not a party beneficially interested and cannot apply for a writ of certiorari to annul the order of a justice's court striking an attorney's name from the files.[3]

15. Case of Lowenthal, 61 Cal. 122 (citing Ex parte Biggs, 64 N. C. 202, and Matter of Randall, 11 Allen (Mass.), 473).

16. Case of Lowenthal, 61 Cal. 122.

17. In re McCowan, 175 Cal. 51, 170 Pac. 1100. The same rule applies to an application to revoke admission to practice. In re Wells, 174 Cal. 467, 163 Pac. 657.

18. In re Wharton, 130 Cal. 486, 62 Pac. 741.

19. In re Philbrook, 108 Cal. 14, 40 Pac. 1061; In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169; In re Tyler, 2 Cal. Unrep. 740, 13 Pac. 169.

20. Tyler v. Presley, 72 Cal. 290, 13 Pac. 856.

1. Philbrook v. Newman, 85 Fed. 139.

2. Matter of Danford, 157 Cal. 425, 108 Pac. 322; In re Thompson, 5 Cal. Unrep. 414, 45 Pac. 1034.

3. Baird v. Justice's Court, 11 Cal. App. 439, 105 Pac. 259.

§ 141. Right to Reinstatement.—An order of judgment of disbarment is not necessarily final or conclusive for all time, and does not preclude the court for good cause from setting it aside and restoring the delinquent attorney.[4] This has been established from an early date,[5] and is not altered by the California statute. That statute merely regulates the procedure, and in no wise defines the effect of the order upon the powers of the court. That effect must be determined by the ordinary rules of law, which authorize the court to mitigate the sentence upon a showing of good cause arising subsequently.[6]

Nevertheless it has been pointed out that a proceeding for the reinstatement of a disbarred attorney presents serious questions for the consideration of the court and is one in which the public has a large interest.[7] Where an attorney has been once disbarred, a mistaken charity should not restore him to his position. That restoration should only come when he has lived long enough after his disbarment in honorable intercourse with his fellow-citizens to demonstrate that he is both tried and true.[8] It should always be kept in mind that in determining such a question the court is not considering an application to relieve the applicant from punishment or to give him an opportunity to reform, but that its sole object is to determine whether or not the character of the applicant is such that he should be admitted to an office of trust and recommended to the public as a trustworthy person fit to be consulted by others in matters of confidence.[9]

4. In re Burris, 147 Cal. 370, 81 Pac. 1077; In re Treadwell, 114 Cal. 24, 45 Pac. 993; In re Boone, 90 Fed. 793. See, generally, the cases cited infra, §§ 141–143.

5. In re Treadwell, 114 Cal. 24, 45 Pac. 993 (quoting Ex parte Pyke, 6 Best. & S. 703, 122 Eng. Reprint, 1354 (1865); Anonymous Case, 17 Beav. 475, 51 Eng. Reprint, 1118 (1852); and Rex v. Greenwood, 1 Wm. Black 222, 96 Eng. Reprint, 122 (1760)).

6. In re Treadwell, 114 Cal. 24, 45 Pac. 993.

7. In re Thompson, 37 Cal. App. 344, 174 Pac. 86.

8. In re Shepard, 35 Cal. App. 492, 170 Pac. 442.

9. Opinion of the supreme court denying a hearing of In re Mash, 39 Cal. App. 548, 179 Pac. 897.

Consequently, the decisive question to be determined is whether the disbarred attorney is at the present time a man of good moral character, and a fit and proper person to practice law and to be intrusted with the duties and accorded the privileges incident to that practice.[9a]

The pardoning power of the governor does not extend to the reinstatement of an attorney excluded from the practice by law or the order of a court.[10]

§ 142. Applications for Reinstatement.—A former judgment of the court that an attorney had been guilty of a violation of his duty as attorney and counselor, and of his oath of office as such, is a judicial determination of that fact, by reason of which it is estopped from any investigation of the sufficiency of the proofs to establish the charge, or of the legal effect of those proofs.[11] Accordingly, an application for a reinstatement is not to be regarded as a motion to vacate an order by which a license granted was revoked, but as an application for admission to the bar.[12] Hence, although a court may not be empowered to set aside a judgment of disbarment entered at a prior term of the court, the person disbarred may be readmitted if he possesses the qualifications required for such admission.[13]

Evidence admissible.—It has been the usual practice in California to receive, in support of such applications, evidence in the form of affidavits,[14] although unverified petitions and testimonials from judges and lawyers in the state have been considered,[15] in view of the fact

9a. In re Mash, 39 Cal. App. 548, 179 Pac. 897.

10. Cohen v. Wright, 22 Cal. 293.

11. Ex parte Tyler, 107 Cal. 78, 40 Pac. 33.

12. Opinion of supreme court denying rehearing of In re Mash, 39 Cal. App. 548, 179 Pac. 897; Danford v. Superior Court, 33 Cal. App. Dec. 168, 193 Pac. 272; In re Boone, 90 Fed. 793.

13. In re Boone, 90 Fed. 793.

14. In re Thompson, 37 Cal. App. 344, 174 Pac. 86 (citing In re Treadwell, 114 Cal. 24, 45 Pac. 993; In re Shepard, 35 Cal. App. 492, 170 Pac. 442).

15. In re Thompson, 37 Cal. App. 344, 174 Pac. 86 (citing In re

that such persons are morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement unless they are satisfied of the rehabilitation of his character.[16] An application by an attorney at law for reinstatement to practice upon the ground of reformation of character cannot be considered, however, where the letters asking for such reinstatement are from attorneys residing out of the state and their signatures are not verified.[17] Since the purpose of disbarment is not the punishment of the attorney but the protection of the public,[18] a request for reinstatement cannot be granted except upon some formal showing of a reformation of character,[19] and affidavits stating that the former attorney has been punished enough are insufficient.[20]

Jurisdiction.—Since an application for reinstatement is regarded as in the nature of an application for admission,[21] it must be addressed to the court having jurisdiction to admit attorneys to practice, and not to the court which gave the judgment of disbarment.[22]

§ 143. Right to Mandamus.—It is well settled that mandamus will lie to compel the reinstatement of attorneys wrongfully disbarred,[1] or to compel the trial court to allow a disbarred attorney to prosecute a case in which he is a party.[2] This writ may be either alternative[3] or peremptory.[4]

Burris, 147 Cal. 370, 81 Pac. 1077; In re Shepard, 35 Cal. App. 492, 170 Pac. 442).

16. In re Thompson, 37 Cal. App. 344, 174 Pac. 86 (citing Code Civ. Proc., § 282, subds. 1, 2).

17. In re Thompson, 37 Cal. App. 344, 174 Pac. 86.

18. See supra, § 115.

19. In re Thompson, 37 Cal. App. 344, 174 Pac. 86.

20. In re Shepard, 35 Cal. App. 492, 170 Pac. 442.

21. See supra, this section.

22. Danford v. Superior Court, 33 Cal. App. Dec. 168, 193 Pac. 272.

1. Case of Lowenthal, 61 Cal. 122; People v. Turner, 1 Cal. 190; People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

2. Philbrook v. Superior Court, 111 Cal. 31, 43 Pac. 402.

3. People v. Turner, 1 Cal. 190.

4. People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

As the reason for allowing mandamus, it has been said that there is no other specific or adequate legal remedy available, for an action of damages for depriving the attorney of his license to practice is too uncertain, and subjects the party to great delay.[5] It cannot be said, as a reason against the rule, that mandamus interferes with the exercise of the discretionary powers of the court below.[6] An attorney, by his admission as such, acquires rights of which he cannot be deprived at the discretion of a court, any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his commercial avocation.[7] It is true that, being officers of the court, attorneys are in many respects subject to the orders of the court, but these orders must be the result of sound and legal, and not of arbitrary and uncontrolled discretion.[8]

5. People v. Turner, 1 Cal. 190.
6. People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.
7. Fletcher v. Daingerfield, 20 Cal. 427; People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.
8. People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

(P. F.)

ATTORNMENT.

See LANDLORD AND TENANT.

AUCTIONS.

1. Scope of Article—Definitions.
2. Statutory Regulation—Licenses.
3. Authority of Auctioneer.
4. Conduct and Validity in General.
5. Puffing and By-bidding.
6. Stifling of Competition—Agreements not to Bid.
7. Memorandum of Sale.
8. Enforcement of Sale.
9. Compensation of Auctioneer.
10. Liability of Auctioneer.

§ 1. Scope of Article—Definitions.—In this article, matters touching upon the conduct, validity and enforcement of sales at public auction, and the rights and liabilities of auctioneers, are dealt with in so far as they have come before the California courts. The extent to which auctions and auctioneers are controlled by statute is also indicated. While judicial[1] and execution[2] sales are usually made at auction, the principles applicable to these subjects have little in common with those applicable to other auction sales, and are treated elsewhere. Likewise, sales at auction of property which has been pledged,[3] or against which a valid lien subsists,[4] or of real property for purposes of partition,[5] and sales of delinquent stock,[6] are treated under other and more appropriate titles. Other and related branches of law such as agency,[7] sales,[8]

1. See JUDICIAL SALES.
2. See EXECUTIONS.
3. See PLEDGES.
4. See LIENS.
5. See PARTITION.
6. See CORPORATIONS.
7. See AGENCY, vol. 1, p. 683.
8. See SALES.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 195 Pac.

the statute of frauds,[9] and the rights and liabilities of vendor and purchaser,[10] are not discussed except as they bear directly upon auctions or auctioneers.

A sale at auction is defined by the code as "a sale by public outcry to the highest bidder on the spot."[11] One who conducts such a sale for another on commission or for recompense is termed an auctioneer.[12] Any citizen of the state may become an auctioneer for the county in which he resides upon a compliance with statutory requirements.[13] In a city or town where there is no auctioneer, the sheriff or constable thereof is ex-officio auctioneer, and is permitted to sell any property, real or personal, at public auction.[14]

§ 2. **Statutory Regulation—Licenses.**—It cannot be disputed that the state, in the exercise of its police power, may limit or qualify the right of persons to engage in the business of auctioneer.[15] In the exercise of this power the legislature has provided that those desiring to become auctioneers must give a bond for the faithful performance of their duties, and must pay a license fee for the privilege.[16] No auctioneer's license is required, however, for the sale at public auction of government goods.[17] License charges are classed according to the amount of sales proposed to be made monthly.[18] Auctioneers' licenses may be renewed,[19] but they are not transferable; nor is any auctioneer permitted to use his license for the purpose of transacting an auction business in more than one store or

9. See FRAUDS, STATUTE OF.

10. See VENDOR AND PURCHASER.

11. Civ. Code, § 1792.

12. 2 Ruling Case Law, p. 1117, § 2.

13. Pol. Code, § 3284.

14. Pol. Code, § 3291.

15. State v. Conkling, 19 Cal. 501-(holding that the act of 1859, Stats. 1859, p. 352, entitled "An act to provide for the licensing of auctioneers and to define their duties and liabilities," repealed or superseded the sections of the Revenue Act of 1857, imposing a duty on sales of personal property at auction).

16. Pol. Code, §§ 3284, 3285.

17. Pol. Code, § 3286.

18. Pol. Code, §§ 3287, 3376.

19. Pol. Code, §§ 3288, 3289.

specified place of business.[20] Auctioneers must keep records of sales made by them,[1] and must make quarterly reports of their sales.[2] Penalties are imposed for failure to so report or for reporting falsely.[3] Sales at auction in cities are subject to special regulations.[4] Auctioneers desiring to hold sales in cities must designate their places of business,[5] and can sell at no other place, except when the character of the goods necessitates a sale elsewhere.[6] The city authorities may designate such place or places therein for the sale by auction of personal property as they deem expedient.[7]

§ 3. Authority of Auctioneer.—The authority of an auctioneer to conduct a particular sale is necessarily derived from the person whose property he undertakes to sell. The extent of his authority, in the absence of special authorization or controlling usages, is regulated by statute. He can sell only at public auction to the highest bidder, and must sell for cash except when the articles put up for sale are such as are usually sold on credit at auction. He may warrant in like manner with other agents employed to sell property. He may prescribe reasonable rules and terms of sale. He may deliver the thing sold upon payment of the purchase price, and collect the price. And he may do whatever else is necessary, or proper and usual in the ordinary course of business for effecting these purposes.[8]

When one assumes to act as auctioneer for the sale of property of another, that fact is sufficient, prima facie, to justify the inference that he was duly authorized to do what he claims authority to do, and where the question of

20. Pol. Code, § 3290.
1. Pol. Code, §§ 3305, 3306.
2. Pol. Code, § 3310.
3. Pol. Code, § 3322, 3323.
4. Pol. Code, §§ 3307, 3308.
5. Pol. Code, § 3302.
6. Pol. Code, § 3303.
7. Pol. Code, § 3304.
8. Civ. Code, § 2362. As to implied authority of auctioneer to receive payment for commodities which he is authorized to sell, see note, 8 A. L. R. 227.

agency in fact becomes material, the burden is upon him to rebut the presumption arising from his claim of authority.[9] Thus, where an auctioneer sells land of another, claiming authority to do so, such assumption of authority is, as against himself, at least prima facie evidence of the necessary written authority.[10] Though an auctioneer is primarily the agent of the person in whose behalf he conducts the sale, and is exclusively such up to the time when he knocks down the property to the highest bidder, upon the fall of the hammer he also becomes the agent of the buyer, and from that time until the consummation of the sale he is the agent of both seller and buyer for the purpose of drawing up and signing the memorandum of the transaction which takes the case out of the statute of frauds.[11] His authority terminates, however, when the sale is closed, and he cannot thereafter, unless specially authorized, rescind or vary the contract, or bind the purchaser by an entry, or deal with him as to the terms on which the title is to be made.[12] As special trust and confidence is placed in an auctioneer, it would seem that he should not be allowed to delegate his authority to others. Yet, he is not required to make all the sales in person, but is authorized by statute to employ a copartner or clerk to hold a particular sale when for certain specified reasons he is unable to attend the sale himself. And any auctioneer may employ a crier at any and all sales.[13]

§ 4. Conduct and Validity in General.—Sales at auction may be, and in some cases, as has been provided by statute,[14] must be preceded by advertisement. At the time and place appointed for the auction, the auctioneer

9. As to proof of agent's authority generally, see AGENCY, vol. 1, p. 866..

10. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640.

11. Civ. Code, § 2363. See infra, § 7.

12. Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299.

13. Pol. Code, § 3292. See generally, as to delegation of agent's authority, AGENCY, vol. 1, p. 725.

14. Pol. Code, § 3307.

announces the terms and conditions under which the property is to be sold. As provided by statute, when the sale is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit.[15] If the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him, and upon such a sale bids by the seller or any agent for him are void.[16] Real property is generally sold subject to the right of the buyer to decline the bargain if he discovers on examination that the title of the vendor is defective.[17] Where an auction sale of land is announced by means of a printed catalogue in which a number of different tracts belonging to different parcels are placed at the end of each description, a statement at the end of the catalogue warranting the title perfect, allowing time for a search thereof, and stating the terms of payment, applies generally to each separate tract of land described therein, and not merely to the one which immediately precedes it.[18] The Civil Code provides that a sale of a stock in trade at auction is conclusively presumed to be fraudulent and void as against the creditors of the vendor unless, prior to the consummation of the sale, a notice has been recorded, stating the time, terms and place of sale, the names and addresses of the vendor and auctioneer, and a description of the property to be sold.[19]

§ 5. **Puffing and By-bidding.**—In some instances assistants are employed by the vendor or auctioneer to appear at auction sales for the purpose of making fictitious bids,

15. Civ. Code, § 1795.
16. Civ. Code, § 1796.
17. Middleton v. Findla, 25 Cal. 76. See VENDOR AND PURCHASER.
18. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640.
19. Civ. Code, § 3440. See FRAUDULENT SALES AND CONVEYANCES.

thereby inflating the value of the property and increasing competition among the bona fide bidders. Such assistants are variously designated as "puffers" or "by-bidders."[20] The section of the Civil Code which provides that

"The employment by a seller of any person to bid at a sale by auction, without the knowledge of the buyer, without the intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer which entitles him to rescind his purchase,"[1]

is a definite statement of the public policy toward such practices, and is but an enactment of the common-law rule declaring the practice of by-bidding against public policy.[2] Though the section above quoted is intended for the benefit of the innocent purchaser and him alone, nevertheless the use of by-bidders at a sale without the knowledge of the buyer constitutes a fraud upon the public in general, and the mere fact that no purchaser has undertaken to rescind his purchase because of the use of by-bidders does not operate to condone the fraud. It follows that a contract which contemplates a resort to such a practice is fraudulent from its inception, and cannot form the basis of a recovery by either of the parties thereto. Nor is a contract which contains such a provision severable so that effect can be given to other provisions otherwise unobjectionable. In such cases, the fraud being against the public, the pleading of such fraud is not a condition precedent to the court's taking cognizance of it.[3]

§ 6. Stifling of Competition—Agreements not to Bid.—It is well recognized that when two or more bidders enter into an agreement for the purpose of preventing fair competition and thus depressing the price of articles offered for sale at auction below market value, such agreement is

20. Dealey v. San Mateo Land Co., 21 Cal. App. 39, 130 Pac. 166.

1. Civ. Code, § 1797.

2. See 1 Ruling Case Law, pp. 1128–1131.

3. Dealey v. San Mateo Land Co., 21 Cal. App. 39, 130 Pac. 166.

not enforceable as between the parties thereto, but may be avoided by them as a fraud upon the rights of the vendor, and as opposed to public policy. All combinations or associations of the parties at an auction are not illegal and void, however. The courts will look to the intention of the parties, and if that is fair and honest, and the primary purpose is not to suppress competition, but to protect their own rights or advance their own interests, and there is no fraudulent purpose to injure or defraud others interested in the result of the sale, the agreement may be upheld. This is especially true in the case of a union of several persons formed on account of the magnitude of the sale, or where the quantity offered to a single bidder exceeds the amount which individuals might wish to purchase on their own account.[4] However void and unenforceable an agreement not to bid may be in itself, an executed sale of land to a party to such an agreement is not void, and though the vendor at the proper time and by the proper conduct may rescind it, and have it annulled, he must act promptly. Laches on his part will deprive him of this right. The fact that there is sufficient evidence to establish prima facie the alleged agreement to prevent competition at the sale is not alone sufficient to sustain the vendor's case for a rescission of such conveyance, and it is not error to grant a motion for a nonsuit where there is a failure of other necessary averments and proofs to justify the recovery.[5]

§ 7. **Memorandum of Sale.**—As sales at auction are within the statute of frauds, a written memorandum thereof is absolutely essential to insure their enforcement.[6] The requirements of the law in this regard are

4. Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134. See 1 Ruling Case Law, p. 1131.

5. Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837 (citing Civ. Code, § 1691, with reference to the rescission of contracts).

6. Middleton v. Findla, 25 Cal. 76; People v. White, 6 Cal. 75. See FRAUDS, STATUTE OF.

sufficiently met by an entry made by the auctioneer in his sale-book at the time of the sale specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale and the name of the buyer,[7] the memorandum of an auctioneer being looked upon as a contract between the vendor and vendee reduced to writing, and executed by their mutual agent. The law in allowing the auctioneer to act in the nearly unprecedented relation of agent for both parties imposes a qualification not applied to the usual case of agency, and requires that the single act which, almost from necessity, he is authorized to perform for the buyer; i. e., the making of the memorandum of sale, shall be done at the time of the sale, and before the termination of proceedings. Otherwise, the vendee will not be bound by the contract. Where the rights of parties are concerned, a day will not be considered a unit, but inquiry may be made as to the very point of time when an act was done.[8]

§ 8. **Enforcement of Sale.**—There is a general rule of auction sales which has been incorporated into the code[9] that until the auctioneer has announced his acceptance, any bidder may withdraw his bid if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer.[10] A sale at public auction is complete, though, when the auctioneer publicly announces in any customary manner that the thing is sold. The purchaser's bid is then accepted and he cannot withdraw it, but must pay the purchase money.[11] The failure or inability of the vendor to give a good title to the property justifies the vendee in refusing to complete the purchase,[12] but a pur-

7. Civ. Code, §§ 1624, 1798; Code Civ. Proc., § 1973.

8. Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299.

9. Civ. Code, § 1794.

10. Hibernia Sav. & L. Soc. v. Behnke, 121 Cal. 339, 53 Pac. 812.

11. Young v. Patterson, 9 Cal. App. 469, 99 Pac. 552 (citing Civ. Code, §§ 1793, 1794).

12. Estate of Hamilton, 120 Cal. 421, 52 Pac. 708.

chaser of land at auction is not justified in refusing to accept a conveyance, and in demanding back a deposit paid by him on account of purchase money, because of the opinion of learned counsel, given in good faith, that the title is not safe, if the opinion is erroneous and the record title is in fact perfect.[13] Inadequacy of price alone is not sufficient to warrant a court in setting aside a sale at auction.[14] When an auctioneer sells a balance of goods, without specifying their quantity, he has a reasonable time to ascertain it; when this is done, and a bill of particulars is made out and delivered to the purchaser, who pays the purchase money, or a portion of it, the contract becomes executed, and the auctioneers will not afterward be permitted to allege a mistake as to the quantity.[15] If an auctioneer, acting as agent for a mortgagee, sells the mortgaged property for the agreed purpose of satisfying, in so far as possible, the mortgage debt, the proceeds of the sale become the absolute property of the mortgagee, and the purchaser has no right to deduct therefrom any indebtedness due from the mortgagor to the purchaser.[16]

§ 9. **Compensation of Auctioneer.**—When the owner of property places it in the hands of an auctioneer to be sold, and the auctioneer sells it in accordance with the instructions of the owner, or in pursuance of the terms of the agreement between them, he is entitled to compensation for his labor. The amount of compensation will depend upon the contract if there be one in respect to it; or, in the absence of any agreement on the subject, it will be measured by the value of the services rendered.[17] The maximum compensation which an auctioneer may demand

13. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640.

14. Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837.

15. Burgoyne v. Middleton, 4 Cal. 64.

16. Williams v. Corker, 144 Cal. 468, 77 Pac. 1004. See MORTGAGES.

17. Middleton v. Findla, 25 Cal. 76.

or receive for his services is fixed by statute, and any overcharge will subject him to the payment of a penalty to the aggrieved party.[18] One representing himself as the owner of real estate, who employs an auctioneer to sell the same under an agreement that in the event of a sale the auctioneer shall receive for his services a percentage on the amount bid, cannot, after a sale by the auctioneer, avoid paying him for his services because the purchaser refuses to take the property, owing to a real or alleged defect in the title. The auctioneer in such case is entitled to compensation for his services, unless there is a special agreement that it shall depend on the consummation of the sale.[19] Moreover, an auctioneer is not a guarantor of the payment of the purchase price on sales of land, and does not lose the right to commissions by reason of the default of the purchasers in such payments.[20] But he cannot recover commissions for sales made under a contract containing a provision contemplating the employment of puffers or by-bidders.[1] The assignee of one who has sold lands at auction for the owner thereof may recover the commissions due the auctioneer for such services.[2]

§ 10. Liability of Auctioneer.—The relation between an auctioneer and one for whom he undertakes to conduct a sale at auction being purely contractual, the nature and extent of his liability depend largely, in each instance, upon the terms of the particular contract existing between them. With reference to the deposit of earnest-money which the successful bidder at an auction sale is usually required to make as security for compliance with his bid, the auctioneer is a stakeholder, and consequently should not pay it to either party without the consent of the other. And when by the terms of the sale the deposit becomes

18. Pol. Code, § 3309.

19. Middleton v. Findla, 25 Cal. 76.

20. Benedict v. Wilson, 10 Cal. App. 719, 103 Pac. 350.

1. Dealey v. East San Mateo Land Co., 21 Cal. App. 39, 130 Pac. 1066. See supra, § 5.

2. Benedict v. Wilson, 10 Cal. App. 719, 103 Pac. 350.

a portion of the cash payment and the property of the vendor upon the title of the property being shown to be perfect, he cannot return it to the purchaser except at his own risk. Though a sale has been made by an auctioneer without proper authorization by the owner, proof of a subsequent ratification of the sale by the owner before the return of the deposit money to the purchaser by the auctioneer will sustain an action by the owner against the auctioneer for the amount of the deposit.[3] It is now established that an auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual.[4] The code provides that an auctioneer is liable for the acts of his assistants,[5] and further, that anyone aggrieved or damaged by any act of an auctioneer in violation of or contrary to the law, has an action against him and his bondsmen on his official bond.[6] It is a misdemeanor for anyone to act illegally as an auctioneer,[7] and any person who holds a mock auction is punishable at law, and is forever disqualified to act as auctioneer within the state.[8]

3. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640 (holding that in an action by the owner of land sold at auction to recover from the auctioneer the amount of a deposit returned to the purchaser, evidence of the opinions of attorneys who pronounced the record title of the owner unsafe, and also evidence as to the meaning of the printed terms of sale, is inadmissible).

4. Swim v. Wilson, 90 Cal. 126, 25 Am. St. Rep. 110, 27 Pac. 33. See AGENCY, vol. 1, pp. 818, 819, for a review of the earlier cases and a consideration of the conflict of authority on this point.

5. Pol. Code, § ~~6252~~ 3292.

6. Pol. Code, § 3324.

7. Pol. Code, § 436.

8. Pen. Code, § 535.

(E. H. R.)

(See "Erratum," 1926 Supp. 234)

AUDITORS.

See COUNTIES; MUNICIPAL CORPORATIONS.

AUTOMOBILES.

I. INTRODUCTORY.
II. PUBLIC REGULATION.
III. PROPERTY RIGHTS AND CONTRACTS.
IV. NEGLIGENCE IN OPERATION.
V. CRIMES AND PUNISHMENT.

I. Introductory.

1. Definitions and Distinctions.
2. Scope of Article.
3. Survey of California Law.

II. Public Regulation.

4. Power to Regulate in General.
5. Judicial Notice of the Character of Automobiles.
6. Power to Limit Speed.
7. Licensing by Municipalities.
8. Nature of Motor Vehicle Act.
9. Validity of Imposition of License Fees in General.
10. Illegal Discrimination.
11. Due Process of Law.
12. Exemption of Public Service Corporations from License Fees.
13. Sufficiency of Title of Act.
14. Status of Officials.
15. Provisions as to Brakes and Headlights.
16. Requirement That Motorist Stop After Accident.
17. Conflict Between State Laws and Local Ordinances in General.

This article covers the cases up to and including 181 Cal., 41 Cal. App., 195 Pac., 33 Cal. App. Dec., 61 Cal. Dec. to March, 1921.

18. Further Questions as to Conflict.
19. Vehicular Traffic as a "Municipal Affair."
20. Conflicts With the Vehicle Act of 1915.
21. Regulation of Jitney Buses in General.
22. Requirement of Bond or Insurance Policy.
23. Liability Under Policy.

III. Property Rights and Contracts.

IN GENERAL.

24. General Rules of Property.
25. Bailment.
26. Pledge.
27. Lien for Repairs in General.
28. Recovery for Repairs.

INSURANCE.

29. In General.
30. Warranties and Representations.
31. Reformation of Policies.
32. Waiver of Proofs of Loss.
33. Insurance Agents and Brokers.
34. Actions on Policies.
35. Exemption from Execution.
36. Damages for Injury.
37. Damages for Wrongful Detention.

SALES AND SALES AGENCIES.

38. Contract of Sale in General.
39. Purchase by Agent.
40. Purchase by Wife as Agent of Husband.
41. Delivery.
42. Refusal to Accept—Remedies.
43. Actions for Refusal.
44. Turning in Old Machine.
45. Warranties.
46. Conditional Sales in General.
47. Nature of Contract—Seller's Remedies.

48. Rights of Conditional Purchaser.
49. Encumbrances Created by Purchaser.
50. Assignment by Seller.
51. Assignment by Purchaser.
52. Default in Payment in General.
53. Seizure of Automobile by Seller.
54. Right of Purchaser to Complete Purchase.
55. Fraud in Sales in General.
56. Independent Investigation by Purchaser.
57. Remedies of Purchaser.
58. Persons Liable for Wrongs.
59. Fraud as to Creditor.
60. Parol Evidence to Vary Written Sales Contract in General.
61. Oral Representations not Amounting to Fraud.
62. Sales Agencies in General.
63. Authority to Bind Principal.
64. Ratification by Principal.
65. Commissions.

IV. Negligence in Operation.

GENERAL PRINCIPLES.

66. Negligence in General.
67. Duty to Avoid Accident.
68. Duty to Observe Roadway, Give Warning, etc.
69. Rights and Duties in Towing Machine.
70. Negligence per se.
71. Contributory Negligence in General.
72. Imminent Peril Rule.
73. Questions of Law and Fact.
74. Effect of Speed Limitations in General.
75. Violation of Speed Laws as Negligence per se.
76. Statutory Prohibition of Dangerous Speed.

PERSONS CHARGEABLE.

77. Liability in General.
78. Injuries by or to Infants.
79. Passengers in General—Imputed Negligence.

80. Selection of Driver.
81. Control Over Driver—General Rule.
82. Specific Instances.
83. Reliance on and Interference With Driver in General.
84. On Approaching Railway Tracks.
85. Passenger's Duty to Safeguard Himself in General.
86. At Railway Crossings.
87. Doctrine of Respondeat Superior in General.
88. Responsibility of Owner in General.
89. Retention of Control by Owner.
90. Effect of Family Relation.
91. Presumption of Liability from Proof of Ownership.
92. Effect of Proof to Overcome Presumption.
93. Responsibility of Employers in General.
94. Independent Contractors.
95. General Rule as to Scope of Employment.
96. Disobedience of Instructions.
97. Use of Automobile for Employee's Own Purposes.
98. Use of Automobile in Going to and Returning from Work.

NEGLIGENCE REGARDING PEDESTRIANS.

99. Duty Toward Persons in Street in General.
100. Right of Pedestrians to Use of Streets.
101. Reciprocal Duties of Motorists and Pedestrians.
102. Negligence Toward Pedestrians in General.
103. Excessive Speed.
104. Duty on Approaching Pedestrians from Behind.
105. Duty Toward Persons Boarding or Alighting from Street-cars.
106. Unavoidable Accident.
107. Care Required of Persons in Street in General.
108. Effect of Imminent Peril.
109. Right to Assume Lawful Conduct of Motorist in General.
110. When Boarding, Alighting from, or Crossing in Front of Street-cars.
111. Duty of Pedestrian to Look in General.
112. When Crossing Between Street Intersection.
113. Automobiles Coming from Behind.
114. Boarding or Alighting from Street-cars.

NEGLIGENCE REGARDING ANIMALS.

115. Duty Toward Animals in Roadway in General.
116. Contributory Negligence.

DUTY IN RESPECT TO OTHER VEHICLES.

117. In General.
118. Automobiles.
119. Bicycles.
120. Horse-drawn Vehicles.
121. Street-cars.
122. Law of the Road in General.
123. Permissible Uses of Left-hand Side of Roadway.
124. By Street-car.
125. Instances of Improper Use.
126. Duty of Slow-moving Vehicles.
127. Duty on Meeting and Passing Other Vehicles.
128. Duty on Overtaking and Passing.

PARTICULAR PLACES AND CIRCUMSTANCES.

129. In General.
130. Barriers and Warning Lights.
131. On Defective Highway.
132. Speed at Bridges.

AT HIGHWAY AND STREET INTERSECTIONS.

133. Care Required Generally.
134. Excessive Speed.
135. Speed Where View is Obstructed.
136. Control of Speed.
137. Right of Way and Speed in General.
138. Rule Applied.
139. Vehicles Following Each Other.
140. Turning at Intersections.

AT RAILWAY CROSSINGS.

Street Railways.

141. In General.

142. Duty of Street-car Companies.
143. Instances of Motorist's Negligence.
144. Instances of Street-car Company's Negligence.

Interurban Railways.

145. Duty of Motorist at Interurban Crossings.
146. Motorist's Negligence per se.
147. Instances of Freedom from Negligence Per Se.
148. Duty of Interurban Electric Railway Companies.

Steam Railroads.

149. Duty of Motorist at Steam Railroad Crossing in General.
150. Reliance on Performance of Duty by Train Crew.
151. Duty When View is Obstructed in General.
152. Selecting Point for Observation.
153. Duty to Leave Machine in Order to Look.
154. Instances of Motorist's Negligence in General.
155. Crossing in Front of Train.
156. Negligence of Railroad Company.

PROXIMATE CAUSE.

157. Rule Generally.
158. Injuries to Pedestrians.
159. Passing Other Vehicles.
160. Collisions at Street Intersections in General.
161. Failure to Give Right of Way.
162. Short Left-hand Turns.
163. Accidents on Defective Highway and at Railroad Crossing.
164. Rule as to "Last Clear Chance" in General.
165. Rule Applied.
166. Defendant's Knowledge of Plaintiff's Peril.

ACTIONS.

In General.

167. Parties.
168. Examination of Jurors.
169. Questions Put by the Court.

170. Inspection of Vehicle by Jurors.
171. Verdict.
172. Necessity for Special Findings.
173. Sufficiency of Findings.
174. Inconsistent Findings.
175. Effect of Findings Unsupported by Evidence.
176. Findings Exonerating Servant of Negligence—Effect of.
177. New Trial.
178. Grounds for Reversal on Appeal in General.
179. Verdict or Findings Based on Conflicting Evidence.
180. Failure to Incorporate Map in Record.
181. Reversal for Conflict with Physical Facts.
182. Application of Rule.

Pleading.

183. Allegations of Negligence in General.
184. Negligent or Willful Injury.
185. Necessity of Alleging Negligence in Terms.
186. Necessity of Pleading Specific Acts.
187. Pleading Ordinances.
188. Title to the Vehicle.
189. Pleading Contributory Negligence.
190. Admissions in Answer.
191. Issues, Proof and Variance.
192. Demurrer.
193. Waiver of Defects in Pleading.

Evidence.

194. Judicial Notice.
195. Burden of Proof—Rules Generally.
196. Doctrine of Res Ipsa Loquitur.
197. Burden of Proving Contributory Negligence.
198. Presumption of Due Care for One's Own Safety.
199. Admissibility of Evidence in General.
200. Financial Condition of Parties—Insurance.
201. Liability of Employer.
202. Character and Capacity of Driver.
203. Operation of Horse-drawn Vehicles.

204. Proof of Other Violations of Law by Defendant.
205. Proof of Admissions in General.
206. Tacit Admissions.
207. Admissibility of Ordinances in General.
208. Harmless Error in Admitting Ordinance.
209. Expert and Opinion Evidence in General.
210. Estimates as to Speed.
211. Cross-examination and Rebuttal.
212. Proof as to Ownership and Agency.
213. As to Unlawful Speed.
214. In Cases of Injury to Passengers.
215. In Cases of Collision With Pedestrians.
216. Collision With Animals.
217. Collisions With Other Vehicles.
218. Collisions at Railway Crossings—Company's Negligence.
219. Motorist's Contributory Negligence.

Instructions.

220. Persons Liable.
221. Contributory Negligence in General.
222. Imminent Peril.
223. Negligent or Willful Injury.
224. Operation of Automobile in General.
225. Injuries to Passenger in General.
226. Control Over Driver.
227. Injuries to Pedestrians.
228. Collisions With Horses or Horse-drawn Vehicles.
229. Law of the Road.
230. Collisions at Street Intersections in General.
231. Right of Way at Intersections.
232. Collisions at Electric Railway Crossings in General.
233. Duty of Motorman.
234. Collisions at Steam Railroad Crossings.
235. Necessity for Instruction on Proximate Cause.
236. Form of Instruction as to Proximate Cause.
237. Failure to Instruct in Terms.
238. Last Clear Chance Doctrine in General.

239. Covering Doctrine in Other Instructions.
240. Requirement of Actual Knowledge of Plaintiff's Peril.
241. Burden of Proof.
242. Consideration of Evidence by Jury.

V. Crimes and Punishment.

243. Violations of Laws Concerning Operation in General.
244. Failure to Stop After Accident.
245. Larceny of Automobile.
246. Jurisdiction and Venue.
247. Complaint or Information.
248. Trial.
249. Evidence in General.
250. Cross-examination and Redirect Examination.
251. Weight and Sufficiency of Evidence to Establish Larceny.
252. Sufficiency of Evidence to Establish Failure to Stop After Accident.
253. Instructions.
254. New Trial.

I. INTRODUCTORY.

§ 1. Definitions and Distinctions.—The Motor Vehicle Act of California declares that the term "motor vehicle" "shall include all vehicles propelled otherwise than by muscular power, except trailers and such vehicles as run upon stationary rails or tracks."[1] It also enacts that the term "automobile," "shall include all motor vehicles excepting motorcycles," and that "motorcycle," "shall include all motor vehicles designed to travel on not more than three wheels in contact with the ground, and of not exceeding ten horse-power, and of not exceeding the weight of five hundred pounds unladen." But it further

1. Stats. 1915, p. 397, § 1, as amended by Stats. 1917, p. 382, and Stats. 1919, p. 191.

Another and different definition is contained in the legislation of 1921, constituting "An act to regulate and license the business of automobile and truck transportation," etc. This act also defines the terms "operator" and "highways."

provides that "any motor vehicle which shall be operated on the public highway drawing a trailer shall be deemed to be an automobile."

Though the term "automobile" is thus given a specialized meaning in the statute, its use as the caption to the present article is in a generic sense, and must be understood as coextensive in meaning with the broader phrase "motor vehicle," as used in the act. We here deal, therefore, with all vehicles propelled otherwise than by muscular power, except such as run on rails. And this includes motorcycles.

§ 2. Scope of Article.—It is the purpose of the present article to treat of all the legal relations into which the automobile enters as subject matter, whether between the public and private individuals, or between private individuals themselves, whether of tort or contract, or involving the cognizance and punishment of crime. It follows that a variety of general principles, drawn from many and unrelated sources, are brought to bear upon the topic, for a more general statement and amplification of which reference must be had to other titles in this work. Thus, while the present article deals with the operation of the automobile as a common carrier of passengers, the complete statement of the law of carriers is found elsewhere.[2] Likewise, supplementary reference may be made to the rules of law governing vehicular traffic in general;[3] the general law of insurance;[4] of sales;[5] of liens;[6] of theft;[7] the general rules governing liability for negligence;[8] questions touching the liability of principal and agent;[9] and of numerous other subjects which will suggest themselves to the reader in due course. It is only in so far as these general rules have found present appli-

2. See CARRIERS.
3. See HIGHWAYS.
4. See INSURANCE.
5. See SALES.
6. See LIENS.
7. See LARCENY.
8. See NEGLIGENCE.
9. See AGENCY, vol. 1, p. 683.

cation to the automobile that they are treated here. But the aim has been to give a complete survey of the law as applied to the automobile, excluding, however, the rights and obligations of garage-keepers,[10] and questions that arise in cases where the automobile is a factor in the operation of the workmen's compensation law.[11]

§ 3. Survey of California Law.—The subject of motor vehicles first engaged the attention of the California legislature in 1905. The first Motor Vehicle Act was then enacted,[12] providing for a system of state registration of such vehicles, enacting rules for their operation on the public highways, requiring the licensing of chauffeurs, and providing penalties for its violation. This act was amended in 1907,[13] and was repealed in 1913 by a much more elaborate statute.[14] The act of 1913, in addition to an amplified system of registration and more detailed rules of operation, placed fines collected for its violations in a special fund for road improvement. It continued in force, however, but two years, when it was repealed and replaced by the Motor Vehicle Act of 1915,[15] which, with amendments made in 1917[16] and in 1919,[17] constitutes the present statute law on the subject. In addition, a special statute was enacted in 1917[18] and amended in 1919,[19] for the regulation of automobiles, jitney buses, auto stages, etc., when used as common carriers and operated over public highways in the state between fixed termini or over a regular route, and placing them under the jurisdiction of the state railroad commission. In 1921 an additional act was passed to regulate and license automobile and truck transportation in important particulars. Moreover,

10. See LIVERY-STABLE AND GARAGE KEEPERS.
11. See WORKMEN'S COMPENSATION.
12. Stats. 1905, p. 816.
13. Stats. 1907, p. 914.
14. Stats. 1913, p. 639.
15. Stats. 1915, p. 397.
16. Stats. 1917, p. 382.
17. Stats. 1919, p. 191.
18. Stats. 1917, p. 330.
19. Stats. 1919, p. 457.

certain provisions of the Political Code have a more or less direct bearing on the operation of motor vehicles.[20]

It is manifestly impossible, within the limits of this article, to furnish the reader with a comprehensive digest of the mass of legislation. The statutes themselves must primarily be resorted to for such information. Their provisions are referred to here only in so far as they have been interpreted and applied by the courts. When the "Motor Vehicle Act," or, as it is styled by the law of 1915, the "Vehicle Act," is referred to without special citation appended in the notes, it must be understood as referring to the current version, that is, to the act of 1915 as amended in 1917 and 1919, or to provisions of earlier statutes carried forward without change into that compilation. When earlier provisions have been modified or repealed, the fact is indicated by a special citation in the notes to the law in which the provision originally occurred.

II. PUBLIC REGULATION.

§ 4. Power to Regulate in General.—The state in its sovereign capacity has the original right to control all public streets and highways, and this carries with it the power to make regulations for the use of streets in incorporated cities and towns. This power is embodied in the provision of the constitution that "the legislature shall have power to establish a system of state highways or to declare any road a state highway."[1] This control of the use of public streets has not been relinquished by the state.[2]

"In operating an automobile on a public highway the operator exercises a privilege, not a right, and the legislature may prohibit altogether the use of automobiles upon the highways or streets of the state. On account of its

20. Pol. Code, § 2931 et seq.

1. Const., art. IV, § 36. See HIGHWAYS.

2. Matter of Application of Smith, 26 Cal. App. 116, 146 Pac. 82.

size and weight, the great power and speed which it is capable of attaining, the automobile may be, and often is, a serious menace, both to other travelers on the highway and the occupant of the vehicle itself. The fatalities caused by such vehicles are so numerous as to permit the legislature, if it deems it wise, wholly to forbid their use upon the public highways. Because it may entirely prohibit, the state, through the legislature, may accord the privilege of operating an automobile subject to such conditions as it may deem it wise to enact. For the greater power includes the lesser."[3]

Whether the power to forbid the use of the highways to automobiles, thus recognized as lodged in the legislature, even extended to the subordinate municipalities of the state is an open, and now—in view of the legislature's own ample exercise of power in relation to the subject—a rather academic question.[4]

§ 5. Judicial Notice of the Character of Automobiles.—Under the statutory provisions that courts take judicial notice "of the true significance of all English words and phrases,"[5] they will assume judicial knowledge of an automobile, its characteristics, and the consequences of its use, and are presumed to have what is common and current knowledge about it. Thus, the court judicially knows that the use of the automobile as a vehicle for traveling is comparatively recent; that it makes an unusual noise;

3. Wirthman v. Isenstein, 28 Cal. App. Dec. 465.

4. It was held in an early case that, because of their then recent use and dangerous and terrifying character, automobiles might be forbidden by county ordinance to travel over public highways in the night-time, and that the burden was on one attacking such an ordinance to show it unreasonable. In re Berry, 147 Cal. 523, 109 Am. St. Rep. 160, 82 Pac. 44.

But, in a later case, decided by one of the courts of appeal, in speaking of the power of a city to regulate motor traffic, it was said: "Of course it could not be, and is not, contended that this power extends to the exclusion of the motor vehicle from the use of the streets of a municipality." Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724. See infra, §§ 17–20, as to conflict between state and local laws and regulations.

5. Code Civ. Proc., § 1875. See EVIDENCE.

that it can be and usually is made to go on common roads at great velocity—at a speed many times greater than that of ordinary vehicles hauled by animals; that beyond doubt it is highly dangerous when used on country roads, putting to great hazard the safety and lives of the mass of the people who travel on such roads in vehicles drawn by horses; that fearful accidents to persons driving animals which are frightened into unmanageable terror by automobiles are of frequent occurrence; that laws regulating the speed of automobiles are frequently violated, and that it is exceedingly difficult for officers, even in the daytime, to stop automobiles going at forbidden speed and arrest the drivers; that the enforcement of such laws is much more difficult in the night-time; and that in the night-time even those automobile drivers who might be considerate of the safety of others may not be able to see an approaching team in time to take the proper precautions.[6]

§ 6. **Power to Limit Speed.**—The state in the exercise of its police power may prescribe reasonable rates of speed for motor vehicles at different places and under different conditions, such as at crossings or intersections of roads or ways; at the approach to an intersecting way, bridge, dam, trestle or viaduct; and at corners or curves in a street or highway. In all such cases it is obvious that the danger to life and property increases in direct proportion as speed is increased.[7] The provision of the Motor Vehicle Act requiring drivers of motor and other vehicles to drive at a rate of speed not greater than is reasonable and proper, having regard to the traffic, and forbidding such a speed as will endanger life, limb or property, is not so uncertain as to the standard of care fixed as to be

6. In re Berry, 147 Cal. 523, 109 Am. St. Rep. 160, 82 Pac. 44. Perhaps at the present time the court's statement of what is judicially known concerning automobiles would be modified in some respects.

7. Matter of Application of Smith, 26 Cal. App. 116, 146 Pac. 82.

incapable of enforcement and therefore invalid.[8] So, also, until the very recent decision that local authorities, because of the legislature's occupation of the entire field, could no longer regulate motor traffic,[9] the power of municipalities to prescribe speed limits not in conflict with general laws was undoubted. Such restrictions, reasonable in themselves, were not invalid as interfering with the right of passage of motor vehicles over public highways, but merely endeavors to regulate and prevent the abuse of that right: "The distinction between the two is quite obvious. The right of passage of motor vehicles is not specially restricted because the owners or operators thereof are required to conform to local traffic regulations made applicable to all kinds of vehicles. All other travelers are required to conform to the local ordinances of the communities in which they travel, and it is no discrimination against one class that they, along with all others, should be required to adapt themselves to the rules governing the local residents of a city in the use of its streets." Thus, an ordinance fixing a speed limit of thirty miles an hour and punishing its violation by imprisonment without the alternative of a fine, is not objectionable on this account, nor is it discriminatory because other sorts of vehicles cannot attain such speed, nor because vehicles of the fire and police departments are exempted from its operation. Nor is the withdrawal of the fine as an alternative to imprisonment, unreasonable if, in the discretion of the legislative authority, it was necessary to make the prohibitions of the ordinance effective.[10]

§ 7. Licensing by Municipalities.—In the history of the automobile as an agency of traffic, local municipalities

8. Ex parte Daniels, 60 Cal. Dec. 269, 192 Pac. 442.

9. Ex parte Daniels, 60 Cal. Dec. 269, 192 Pac. 442 (discussed infra, §§ 19, 20).

10. Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724. But see infra, §§ 17–20, as to conflict between state and local laws.

have at times endeavored, under their charter powers, to impose special licenses upon its operation. Thus, the charter of cities of the sixth class empowering them to license every kind of lawful business "transacted and carried on in the city" unquestionably authorizes the licensing of persons carrying on the business of transporting passengers within the city.[11] But this did not give the city power to impose a license tax on motor vehicles carrying passengers for hire between termini outside the city, merely a portion of the route passing over the city's street, and no stops or solicitation of business being made therein. Such a business is not transacted within the city, within the meaning of such a charter provision.[12] Nor did the fact that a motorcycle driver had not registered his machine, as required by a municipal ordinance declaring the operation of unregistered motorcycles on the city streets unlawful, make him a trespasser on the streets to whom an automobile driver owed no duty except to abstain from his willful injury. Nor did this fact prevent a motorcyclist from recovering for an automobile driver's negligence, especially if the latter was himself violating the speed limit as fixed by ordinance at the time of the collision between the two machines. The general rule in such a case is that one who violates an ordinance wherein a penalty is fixed for noncompliance may be subjected to the penalty, but he cannot, in addition, be deprived of his civil right to recover damages sustained by reason of the negligence or wrong of another, when his violation bore no relation to the injury and did not contribute in the remotest degree thereto. The maxim "ex pacto illicito non oritur actio" has no application to such a case.[13]

11. Municipal Corporation Bill, Deering's Gen. Laws 1915, p. 1123, § 862, subd. 10. And see, for same section, Deering's Gen. Laws 1917–19, p. 1527.

12. Matter of Application of Smith, 33 Cal. App. 161, 164 Pac. 618.

13. Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109. The court, in this case, refused to follow the precedent, established in Massachusetts, that one operating an unregistered automobile on a public highway in violation of a statute has no right of action for injuries

§ 8. Nature of Motor Vehicle Act.—The inevitable challenge to the constitutionality of the Motor Vehicle Act came with respect to the statute of 1913,[14] but as the subsequent revision and amendments of the act follow the same general lines, the principles then determined remain applicable for the most part to the subsequent legislation. With regard to the act of 1913, which was characterized by its title as an act "to regulate the use and operation of vehicles," and which contained many provisions regulatory in their nature, it was declared that it was, in part, a police measure, passed in pursuance of the police power.[15] But the license fees imposed, which are far in excess of the amount required for the administration of the act, and which create a fund for the improvement of public highways, do not represent an exercise of police power, but constitute an excise or privilege tax for the purpose of revenue. The upkeep of public roads is not a police measure.[16] Nor do the fees thus imposed constitute a rental charge for the use of the public highways, which can only properly be exacted for the private appropriation of the use of a highway, to the exclusion of the general public therefrom. Nor do they constitute a toll charge, for the use of a highway artificially created or improved for the benefit of the persons charged, since the fee is exacted from every automobile, for its entry upon or use of any highway in the state, improved or unimproved.[17]

resulting from another's want of ordinary care; Dudley v. Northampton Street R. Co., 202 Mass. 443, 23 L. R. A. (N. S.) 561, 89 N. E. 25.

14. Stats. 1913, p. 639.

15. Matter of Application of Schuler, 167 Cal. 282, Ann. Cas. 1915C, 706, 139 Pac. 685.

16. Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 143 Pac. 700; Matter of Application of Schuler, 167 Cal. 282, Ann. Cas. 1915C, 706, 139 Pac. 685.

See note, 5 A. L. R., p. 759, as to validity of statutes imposing license tax on automobiles as affected by constitutional provisions in relation to taxation.

17. Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 143 Pac. 700.

§ 9. Validity of Imposition of License Fees in General. The excise or privilege tax imposed by the Motor Vehicle Act of 1913 is not invalid because it fixes the amount of the license according to the horse-power of the motor vehicle, and not according to its value as property. The state charges for the privilege of using the roads; and the attempt is made to apportion the charge to the wearing power of the vehicle used. Nor does the fact that an ad valorem tax is levied by local authorities upon all automobiles as property make the license fees charged by the act double taxation, which only occurs when the same property is taxed twice by the same government during the same period. Nor is the act violative of the constitutional provision[18] which forbids the legislature to pass local or special laws for the assessment or collection of taxes, either because it includes the city and county of San Francisco as a county for its purposes while excluding the other cities of the state, or because the greater portion of the funds derived from it are to be expended outside of the cities of the state. As the act requires that the net receipts arising from its enforcement be paid into the "motor vehicle fund" in the state treasury, and also provides that one-half of the receipts shall be returned to the road funds of the counties from whose residence they were received, it would seem to violate that provision of the constitution which declares that the legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, for county, city, town or other municipal purposes.[19] Nevertheless, this invalid feature would not affect the remainder of the act, nor, in particular, the collection of fees under it, in view of the further provision that if any part of the act shall be declared unconstitutional, it was the express legislative intent to pass the statute without that part. The entire fund, in this view, would merely remain in the state treasury for expendi-

18. Const., art. IV, § 25, subd. 10. 19. Const., art. XI, § 12.

tures upon the state roads by the proper state authorities.[20]

§ 10. Illegal Discrimination.—The Motor Vehicle Act is not illegally discriminatory because it applies to motor vehicles and not to other kinds.[1] The power of the legislature being plenary in the matter of imposing a privilege tax, it may designate any class properly subject to such taxation, and may exempt any class. Nor is the act discriminatory because it places dealers in motor vehicles in a class by themselves and accords them a special scale of license fees. No doubt the legislature took into consideration the fact that motor cars in the possession of dealers are usually kept for sale and are not used in the ordinary way, but merely for purposes of demonstration and exhibition to intending purchasers. The special classification of dealers is thus accounted for. Nor is the exemption of nonresidents for a period of three months from the payment of the license fees provided by the act unlawful, the presumption being that nonresidents have paid all necessary licenses in their respective places of abode, and that their use of highways elsewhere is but temporary.[2]

The provisions of the act imposing an annual license fee upon chauffeurs, that is, upon drivers who work for wages or who drive motor vehicles for hire, while other persons operating such vehicles are exempt therefrom, do not create such an unwarranted and arbitrary classification as to render the act unconstitutional and void as special legislation. The occupation of a chauffeur is

20. Matter of Application of Schuler, 167 Cal. 282, Ann. Cas. 1915C, 706, 139 Pac. 685.

1. In re Cardinal, 170 Cal. 519, L. R. A. 1915F, 850, 150 Pac. 348; Matter of Application of Schuler, 167 Cal. 282, Ann. Cas. 1915C, 706, 139 Pac. 685. And see Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724 (where view was expressed that motor vehicles properly lend themselves to separate classification for purposes of legislation, though the point was not directly decided).

2. Matter of Application of Schuler, 167 Cal. 282, Ann. Cas. 1915C, 706, 139 Pac. 685.

one attended with danger, and requires a certain degree of scientific knowledge upon which others must rely. Consequently it is an occupation calling for legislative regulation and admits of the imposition upon it of a regulatory license fee.[3]

§ 11. Due Process of Law.—The Motor Vehicle Act does not deny due process of law to the owners of motor vehicles because the license fees which it imposes are graduated according to horse-power. While the relative horse-power of vehicles may not be the most scientific basis of measuring their potency for injuring the public roads, it cannot be said to be without justification. An automobile of high power is generally heavier than one of low power, and the damage accomplished by the heavier motor is, generally speaking, the greater. Nor does the further fact that the determination of the horse-power of each vehicle is assigned to the state department of engineering amount to a denial of due process of law, since the act requires all owners to file with the state treasurer applications for licenses which shall contain certain data, specifying, among other things, the character of the motive power and its amount in terms of horse-power. Thus, the owner is given the right to present his entire case to the department of engineering. Should that department arbitrarily refuse to act in his application, he could compel consideration by mandamus. Should it act erroneously he would also have his remedy in the courts.[4]

§ 12. Exemption of Public Service Corporations from License Fees.—A public service corporation which, under the provisions of the state constitution,[5] is required to pay to the state a tax upon its operative property com-

3. Matter of Application of Stork, 167 Cal. 294, 139 Pac. 684.

4. Matter of Application of Schuler, 167 Cal. 282, Ann. Cas. 1915C, 706, 139 Pac. 685, per Melvin, J.

5. Const., art. XIII, § 14.

puted at a specified percentage of its gross receipts, which tax "shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property" mentioned, is exempted by the language quoted from the payment of the license or privilege tax imposed by the motor vehicle law, as to those motor vehicles of the company which are exclusively used as a part of its operative property. The constitutional exemption from further taxation was intended to relieve the company not only from the ad valorem taxes previously imposed upon its property, but from all taxes and licenses, including those fixed by the motor vehicle law.[6]

§ 13. Sufficiency of Title of Act.—Under the broad interpretation given to that provision of the state constitution which requires that every act of the legislature shall embrace but one subject which shall be expressed in its title,[7] the Motor Vehicle Act of 1913[8] is not invalid as including more than one subject in its title, though section 31 prohibits chauffeurs from accepting gratuities or bonus payments from dealers from whom they may purchase supplies, and section 20 contains certain rules of the road which are to be observed by all drivers of motor vehicles. All these provisions are relevant to the regulation of automobiles, and in this sense are expressive of but one subject. Moreover, all the parts of the general object to be attained by the statute are sufficiently catalogued in the title. Section 20, in particular, is clearly within the purview of the general objects to be attained by the act, and is covered descriptively by the general caption, "An act to regulate the use and operation of vehicles."[9]

6. Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 143 Pac. 700. See legislation of 1921 requiring every "operator" of motor vehicles for the purpose of carrying passengers and freight "to pay a license therefor."

7. Const., art. IV, § 24.

8. Stats. 1913, p. 639.

9. Matter of Application of Schuler, 167 Cal. 282, Ann. Cas. 1915C, 706, 139 Pac. 685. See STATUTES.

§ 14. Status of Officials.—The official positions created to further the administration of the Motor Vehicle Act, being wholly of legislative origin, are subject to the control of the legislature, and therefore to any regulation or disposition which it may elect to make concerning them. The holder of such a position has no contractual or vested rights in it. These principles were announced in frustrating an attempt to keep alive as a sinecure a position in the office of the secretary of state, known as the "superintendent and cashier of the motor vehicle department," created by certain amendments to the Political Code[10] after the first Motor Vehicle Act of 1905 had attached to the office of the secretary of state the discharge of the duties arising under the statute.[11] This position was held to have been abolished by the implied repeal of the enactments creating it, by the act of 1913, which transferred the motor vehicle department of the state to the state engineer's office.[12]

§ 15. Provisions as to Brakes and Headlights.—The provision of the Motor Vehicle Act that "all motor vehicles must be provided at all times with adequate brakes kept in good working order," imposes an absolute obligation upon automobile owners to have their brakes in good order, irrespective of the care or diligence they may use to that end. Defective brakes are mala prohibita, and intent, knowledge or diligence are immaterial. As thus interpreted, the statute is not confiscatory. Having the power to entirely prohibit the use of motor vehicles on public highways, the legislature may accord the privilege of operation on such conditions as it may deem wise, among others, that the operator shall, at his peril, not only provide adequate brakes, but keep them at all times in repair and in a state of efficiency.[13]

10. Stats. 1909, p. 369; Stats. 1911, p. 573 et seq.

11. Stats. 1905, p. 816.

12. Mansfield v. Chambers, 26 Cal. App. 499, 147 Pac. 595.

13. Wirthman v. Isenstein, 28 Cal. App. Dec. 465. In a con-

The meaning of section 13 of the Vehicle Act regulating automobile headlights and prescribing certain tests to which such headlights must conform, is that the "diffusing type of lens," when used, must be such as has been submitted to the state testing agency therein created, and must conform to the tests prescribed, among others, those calculated to prevent an unlawful glare. The light must have been approved by the state testing agency and certified as lawful to local officials, as provided by the act, before it can be used by automobilists. These provisions, regulating headlights, prescribing tests as to illuminating power and glare, and creating a testing agency in the motor vehicle department to determine whether specific devices sold commercially comply with the statute, are constitutional, for though the legislature may have no power to delegate to a testing agency or any other body the authority to make regulations in the nature of laws, prescribing the quality of headlights which may be used, it is proper for the legislature to establish an agency to ascertain the facts, as to illuminating power, glare, etc., with respect to particular devices offered for sale, and whether these facts conform to the legislative enactment.[14]

§ 16. Requirement That Motorist Stop After Accident. The provision of the Penal Code,[15] now incorporated as section 21 of the Motor Vehicle Act, are to the effect that whenever any motor or other vehicle strikes any person or collides with any vehicle containing a person,

curring opinion in this case Justice Sloane dissents, however, from this view, and holds that while an intentional violation of a law, no matter how prudently done, is negligence per se, there is nothing in previous decisions in California to preclude the defense of involuntary and unavoidable infraction of the law. When the same case came before the supreme court, that tribunal declined to express any opinion as to whether the statute made the owner and driver of a car insurers of the good condition of the brakes. Wirthman v. Isenstein, 182 Cal. 108, 187 Pac. 12.

14. Ex parte Hinkelman, 60 Cal. Dec. 123, 191 Pac. 682.

15. Pen. Code, § 367c. See infra, § 244.

the driver, and occupants who have or assume authority over him, shall stop and render necessary assistance including the carrying of any injured to a physician or surgeon, if necessary or requested, and such driver shall further give the number of the machine, the name of the owner, and the names of the passengers not exceeding five. A violation of the act may be felony, or a misdemeanor, according to the circumstances. It has been held that this act is not in conflict with the constitutional guaranty that no person shall be compelled, in a criminal case, to be a witness against himself.[16] The mere fact that a collision might involve criminal negligence, or a willful injury made criminal by other statutes, is not enough to render the provision invalid, since it might also be that no criminal liability was involved. The act is simply a police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence. It has also been suggested that if a criminal liability were involved, the person guilty might rely on his privilege as granted by the constitution and refuse to give the information required on the ground that it would tend to incriminate him.[17] Nor is the provision unconstitutional because it does not embody in its phraseology words limiting its application to those persons who have knowledge that their vehicles have collided with other persons or vehicles, both because the element of knowledge of the fact of collision is necessarily implied from the requirement to stop and render aid, and because the statute must be read in connection with the requirement of the Penal Code,[18] that in every crime there must exist a union or joint operation

16. Const., art. I, § 13; People v. Fodera, 33 Cal. App. 8, 164 Pac. 22; People v. Diller, 24 Cal. App. 799, 142 Pac. 797, per Shaw, J.

17. People v. Diller, 24 Cal. App. 799, 142 Pac. 797, per Shaw, J.

18. Pen. Code, § 20.

of act and intent.[19] The Motor Vehicle Act of 1913,[20] which went into effect some five months subsequent to the time when section 367c of the Penal Code became law, did not have the effect of repealing the provisions of such code section which denounce as a felony the willful failure of the driver of a motor vehicle colliding with another vehicle to stop and render the specified assistance to a person who may have been injured by the collision; but only those provisions of such section were repealed which denounce as a felony the failure of the driver under such circumstances to stop and give the name and address and the number of his motor vehicle, the latter failure by the provisions of said act being reduced to the grade of a misdemeanor.[1]

§ 17. Conflict Between State Laws and Local Ordinances in General.—The constitution confers on municipalities the power to enforce police regulations within their boundaries which do not conflict with the general laws of the state.[2] And it is a well-settled rule that the mere fact that the state, in the exercise of its police power, has made certain regulations, does not prohibit a municipality from exacting additional requirements, and that, as long as there is no conflict between the two, and the municipal requirements are not in themselves unreasonable or discriminatory, both will stand. It has been repeatedly held that this rule applies to the regulation of vehicular traffic by local authorities.[3] Under this rule, an ordinance making it a misdemeanor, punishable by imprisonment only, to exceed a speed of thirty miles, was held not to conflict with the Motor Vehicle Act of 1905 as

19. People v. Fodera, 33 Cal. App. 8, 164 Pac. 22.

20. Stats. 1913, p. 649, § 21.

1. People v. Finley, 27 Cal. App. 291, 149 Pac. 779.

2. Const., art. XI, § 11. See MUNICIPAL CORPORATIONS.

3. Ham v. Los Angeles County, 59 Cal. Dec. 474, 189 Pac. 462. As to the general rule, see MUNICIPAL CORPORATIONS. And see Mann v. Scott, 180 Cal. 550, 182 Pac. 281; Pemberton v. Arny, 29 Cal. App. Dec. 118, 183 Pac. 356; Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724.

amended in 1907,[4] which fixed speed limits in cities of ten and fifteen miles and provided fine or imprisonment, or both, for its violation. The effect of the ordinance was only to impose a punishment for a more flagrant violation of the rights of the public than the legislature had seen fit to punish.[5] So a city ordinance which required automobile drivers in turning to the right into an intersecting street to keep as close to the right-hand curb as possible, was declared not to conflict with the provision of the Motor Vehicle Act that such automobile shall keep to the right of the center of the street intersection, since the ordinance did not controvert but merely added to the precautions the driver is required to take by the state law.[6] A county ordinance fixing a speed limit over bridge of five miles an hour was held not to conflict with the act of 1913 fixing ten miles as the limit where the view is obstructed on approaching a bridge,[7] it being, at that time, competent for the county to prescribe a less speed than that fixed by statute.[8] And an ordinance requiring driver following street-car to stop ten feet behind them when they stopped for passengers did not conflict with the Motor Vehicle Act of 1913,[9] requiring drivers when passing street-cars to drive with care and caution to safeguard passengers entering or leaving the street-car and to stop if necessary for this purpose.[10] In some of these cases it was pointed out that the version of the Motor Vehicle Act then under consideration allowed, by implication at least, additional local regulations,[11] and the provision in the act of 1915 forbidding local regulation of traffic,[12] though noticed, was not passed upon.[13]

4. Stats. 1907, p. 915.

5. Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724.

6. Pemberton v. Arny, 29 Cal. App. Dec. 118, 183 Pac. 356.

7. Stats. 1913, p. 649, § 22, subd. b.

8. Ham v. Los Angeles County, 59 Am. Dec. 474, 189 Pac. 462.

9. Stats. 1913, p. 639.

10. Mann v. Scott, 180 Cal. 550, 182 Pac. 281.

11. Mann v. Scott, 180 Cal. 550, 182 Pac. 281; Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724.

12. Stats. 1915, p. 397, § 22, subd. 2.

13. Mann v. Scott, 180 Cal. 550, 182 Pac. 281.

§ 18. Further Questions as to Conflict.—A municipal ordinance, however, which allowed a uniform speed of twelve miles an hour in all parts of the city and under all conditions, was declared in conflict with the act of 1913, which prescribed a speed of fifteen miles an hour in the business districts of cities, and ten miles when the view was obstructed.[14] It was pointed out that an automobile driver, in passing through the city, might be traveling within his rights under the state law, yet be violating the ordinance, or vice versa. The act of 1913 was regarded as intended to provide uniform regulations for cities as well as elsewhere, a view which seems to have anticipated that later adopted by the supreme court with regard to the act of 1915.[15] The constitutional provision empowering municipalities to pass local police regulations not in conflict with general laws[16] was said not to authorize the maintenance of an ordinance fixing speed limits in conflict with the Motor Vehicle Act.[17] Yet a county ordinance limiting the speed at which vehicles might be driven over bridges to five miles an hour was decided not to conflict with the Motor Vehicle Act of 1913, declaring that a motor vehicle shall not be driven at greater speed than one mile in six minutes where the operator's view of the road traffic is obstructed in approaching or traversing a bridge. The statutory provision, it was held, related only to cases in which the view is obstructed, and it was pointed out that the state law was intended only to safeguard traffic while the ordinance might have been designed to preserve the bridge.[18] Further illustrating the rule, it has been held that a municipal ordinance which punished the driving of any vehicle along the streets at more than thirty miles an hour by imprisonment of from ten to fifty days for the first offense, and for subsequent offenses, imprisonment of from thirty days to six months, in both

14. Stats. 1913, p. 639, § 22b.
15. See infra, § 20.
16. Const., art. XI, § 11.
17. Matter of Application of Smith, 26 Cal. App. 116, 146 Pac. 82.
18. Ham v. Los Angeles County, 59 Cal. Dec. 474, 189 Pac. 462.

cases without the alternative of a fine, did not impose a penalty so excessive as to be out of harmony with the laws of the state, under which, for the first offense in exceeding a speed limit of twenty miles, the offender might be punished by one hundred dollars fine and imprisonment for thirty days, the hazard to life and property increasing with the speed of the machine and the corresponding difficulty of keeping it under control. Nor did the imposition of imprisonment without the alternative of a fine constitute such an excessive punishment as to render the ordinance objectionable on the same ground, in view of sections 348 and 349 of the Penal Code, making it a felony to endanger human life by overstraining steamboat boilers through ignorance or gross neglect, or to excel any other boat in speed.[19]

§ 19. Vehicular Traffic as a "Municipal Affair."— While local regulations were thus being sustained under the various versions of the Motor Vehicle Act prior to that of 1915, a certain question as to the powers vested in cities of the state possessing "freeholders' charters" remained in abeyance. Cities of this sort are, by the constitution, given power to legislate concerning "municipal affairs" within their borders, quite in defiance of the otherwise general laws of the state.[20] Was the regulation of street traffic a "municipal affair?" Undoubtedly it had usually, in the near past, been so regarded.[1] Nevertheless, when the question was at length squarely presented to the courts, the growing importance of motor travel had its effect; and it was definitely adjudged that the control of vehicular traffic is not a "municipal affair," and that even cities having freeholders' charters are not at liberty to prescribe rules for it in contravention

19. Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724.

20. Const., art. VI, § 6.

1. Helmer v. Superior Court, 32 Cal. App. Dec. 590, 191 Pac. 1001; Matter of Application of Lee, 28 Cal. App. 719, 153 Pac. 992.

of general laws.[2] This is because the streets of a city belong to the entire people of the state, and the control over street traffic is an exercise of the sovereign power of the state. While it is true that the regulation of traffic upon a public street is of special interest to the people of the municipality, it does not follow that such regulation is a municipal affair, and any doubt must be resolved in favor of the legislative authority of the state.[3]

§ 20. Conflicts With the Vehicle Act of 1915.—In the Vehicle Act of 1915 a provision was incorporated which, as construed by the supreme court, completely altered the status of local ordinances with respect to the state law, at least as far as speed limitations are concerned. This provision was that the speed limits therein established should be exclusive of all other limitations fixed by law of the state or any political subdivision thereof, and that local authorities should have no power to enact or enforce any ordinance or regulation conflicting or inconsistent with the provisions of the act.[4] In considering the effect of this provision, the supreme court has pointed out that it would be a violation of the constitutional grant of power to municipalities for the legislature to prohibit local legislation upon the subject of the use of streets, without any affirmative act of the legislature occupying that legislative field. Similarly, it would be unconstitutional if it were construed as an attempt to limit the power of local legislative bodies to pass regulations not inconsistent with such general laws. But under the rule that such a construction must be given to a statute as will make it constitutional and effective if it can be done without violence

2. Ex parte Daniels, 60 Cal. Dec. 269, 192 Pac. 442; Helmer v. Superior Court, 32 Cal. App. Dec. 590, 191 Pac. 1001 (holding that punishing the act of driving a motor vehicle while intoxicated is not a "municipal affair," nor even a traffic regulation, but an exercise of the sovereign power of the state to punish crime).

3. Ex parte Daniels, 60 Cal. Dec. 269, 192 Pac. 442.

4. Stats. 1915, p. 397, § 22, subd. d, as amended by Stats. 1917, pp. 382, 406, and Stats. 1919, p. 223.

to the language used, it was said that in fixing speed limits, the legislature intended to occupy the whole field of traffic regulation. The legislature had as much right to make it lawful to travel at a less as to make it unlawful to travel at a greater speed, and its intent to preserve uniformity by preventing a reduction as well as an increase of speed limits was apparent. Hence, local ordinances fixing speed limits other than those prescribed in the act, whether less or greater, are in conflict with it. They are also in conflict with it because under the act the question of whether a given speed is unreasonable, within the general prohibition of unreasonable speeds where no precise rates are named,—is one for the jury, while local ordinances attempting to prescribe specific rates of speed in such cases would foreclose the jury's action. And a further source of conflict arises from the fact that under the Vehicle Act fines go to the improvement of highways, while for violations of local ordinances they go into the municipal treasury. Thus a municipal ordinance fixing a speed limit of fifteen miles an hour at a certain locality was held to be in conflict with the Motor Vehicle Act, section 22, fixing a speed of twenty miles at that place, and the fact that the ordinance referred to bridges, while the clause of the act applicable to the case referred to congested districts in cities, apparently made no difference.[5] In this last stated rule, an ordinance making it a misdemeanor to drive a motor vehicle while intoxicated conflicts with the Vehicle Act making such act a felony in the discretion of the court, and must give way before it.[6] And a

5. Ex parte Daniels, 60 Cal. Dec. 269, 192 Pac. 442. In this case Justice Olney concurred on the theory that the Motor Vehicle Act should be read as if it provided that the traveler might not travel at an unsafe speed nor exceed a fixed speed, but any other limitation upon him was forbidden. Justice Shaw and Chief Justice Angellotti dissented, adhering to the doctrine of the earlier cases that municipal enactments of greater stringency are not in conflict with state laws. See supra, § 17, for a statement of the doctrine of the earlier cases.

6. Helmer v. Superior Court, 32 Cal. App. Dec. 590, 191 Pac. 1001.

city ordinance fixing speed limits on the streets conflicts with the Vehicle Act, and is void.[7]

§ 21. Regulation of Jitney Buses in General.—Municipalities have the undoubted right, in the exercise of their police powers, to regulate and license vehicles using the streets for the carriage of passengers, and may make it a misdemeanor to carry on such business without a license.[8] Under the general rule the legislation based on a reasonable classification of its subject matter cannot be impeached as discriminatory, and in view of the undoubted right of a municipality, in the exercise of its police power, to so regulate the use of vehicles on its streets as to protect the public, an ordinance defining a "jitney bus" as a self-propelled motor vehicle, other than a street-car traversing the public streets between definite termini and conveying passengers for a fixed charge of not more than ten cents, and so held out, advertised or announced, and proceeding to impose various regulations upon the operation of jitneys, is not unconstitutional as invalid class legislation, jitneys as so defined being a proper subject of special regulation. So, a provision that no one shall operate a jitney bus unless he has had thirty days' experience as an automobile driver in the city does not interfere with the right to pursue a lawful calling, and is not unreasonable.[9] And it has been held that a municipal ordinance which requires motor vehicles licensed to carry passengers over the city's streets between specified termini for a fixed charge of not more than ten cents, to maintain a regular schedule of operation from 6 A. M. to 12 midnight for at least six days a week, and which makes it a misdemeanor not to do so, is not unreasonable, but is a valid exercise of the city's police power. And an amend-

7. Humphrey v. United States Macaroni Co., 33 Cal. App. Dec. 219, 193 Pac. 609.

8. Matter of Application of Lee, 28 Cal. App. 719, 153 Pac. 992.

9. In re Cardinal, 170 Cal. 519, L. R. A. 1915F, 850, 150 Pac. 348, per Angellotti, C. J.

ment to an existing ordinance, which recites that it is for the immediate preservation of the public peace, health and safety and an urgent measure, and shall therefore take effect at once, is not so obviously otherwise as to warrant the court in setting aside the city council's determination on the question.[10] A jitney bus driver who has regularly obtained a permit for its operation from the police commissioner of a city as required by ordinance, does not need to obtain a new permit every time a change is made in the serial state license number of his machine.[11]

§ 22. Requirement of Bond or Insurance Policy.—As the state or municipality may, in the exercise of its police power, require the giving of security from its licensees in all cases where the giving of such security may fairly be a reasonable requirement for the protection of the public, a provision in a municipal ordinance regulating jitney buses, requiring the owner or lessee to give a bond or hold an insurance policy calculated to secure payment of damages to any person injured by the operation of the vehicle, up to the amount of ten thousand dollars, is not an unreasonable requirement. Nor does the further condition that such bond be given by a responsible surety company or association authorized to do business in the state render the provision invalid.[12] The provisions of such an ordinance requiring that the bond shall be conditioned to pay damages directly to the person injured are properly read with a bond which in terms merely promises to pay directly to the plaintiff any judgment recovered against the operator, if such plaintiff sues on the bond within twelve months, the provisions of the ordinance not being so inconsistent with the terms of the bond as to violate the intention of the parties. While it is generally true that the liability of sureties cannot be extended beyond the fair

10. Matter of Application of Lee, 28 Cal. App. 719, 153 Pac. 992.

11. Bond v. Halloway, 31 Cal. App. Dec. 297, 188 Pac. 577.

12. In re Cardinal, 170 Cal. 519, L. R. A. 1915F, 850, 150 Pac. 348.

import of the express undertaking of the bond, an exception exists in the case of bonds given pursuant to law for a public purpose. The law in force at the date of a public bond, fixing its conditions and defining its obligations, is a part of it as effectually as if inserted in it. Hence, in view of this amendment of the bond, the casualty company executing it may be joined as a defendant in an injured party's original action for the injuries.[13]

§ 23. Liability Under Policy.—An indemnity insurance company executing its policy to a jitney bus driver to insure to the benefit of those injured by his negligence, as required by ordinance, even if such insurer is viewed as a surety on a statutory bond, cannot invoke the strict rules which statutes and the courts devise for the protection of gratuitous sureties, the trend of modern decision being to place such policy on the footing of an ordinary contract. When a jitney operator has procured such a policy which covers the date of an accident, the mere fact that he does not file an extension with the city clerk until after the accident does not render the operation of his bus illegal at the time of the accident, or operate to release the company from liability. Nor does the failure of the operator to obtain a new permit from the police commission each time a change is made in the serial state license number of his machine render the operation of his bus an illegal act which avoids the policy. Furthermore, where there was a deviation from his route by the operator, during which an accident occurred it will be presumed on appeal, in the absence of a showing to the contrary, that the deviation was authorized by municipal ordinance and that it was not such as to avoid the liability of the insurance company.[14]

13. Milliron v. Dittman, 180 Cal. 443, 181 Pac. 779.

14. Bond v. Holloway, 31 Cal. App. Dec. 297, 188 Pac. 577.

III. PROPERTY RIGHTS AND CONTRACTS.

In General.

§ 24. General Rules of Property.—As personal property, the motor vehicle comes within the purview of the usual rules which govern the rights and obligations of owners of that class of possessions. It is the subject of the varied sorts of contracts customary in modern business, and is protected by all the rules against unlawful injury to its substance, title or possession. Thus, where an employee in charge of a gasoline supply station, who, after having handed the hose connected with the gasoline pump to the driver of a car, turned on the gasoline before he was certain that the driver had made the necessary connection with the tank, or was ready to receive the same, flooded the car with gasoline, thereby causing a fire, it was held to be negligence, authorizing a recovery of damages against the owner of the supply station and the employee.[15]

§ 25. Bailment.—Conforming to the rules governing bailments, an automobile dealer who takes the car of a prospective purchaser in order to try it out before deciding what allowance he will make for it in the purchase of a new car, assumes the obligation of a depositary as defined by the Civil Code;[16] and it is accordingly his duty to redeliver the car on demand, in default of which he becomes liable for its value. He is a bailee for the mutual benefit of both parties, and is therefore held to ordinary care in his possession of the car. In a case where the purchaser, having a device on the car by which he locks it against theft when it is standing on the street, gives the key to the dealer, and the latter, when trying out the

15. Sanders v. Austin, 180 Cal. 664, 182 Pac. 449. See NEGLIGENCE; and see LIVERY-STABLE and GARAGE KEEPERS as to recovery for destruction of automobile by fire which started in garage.

16. Civ. Code, § 1822. See BAILMENT.

car and on leaving it standing a few moments in a busy city street, fails to employ this safety device, and the unlocked car is stolen, it has been held that the dealer failed to exercise the ordinary care necessary to free him from liability. In such case, a complaint by the owner of the automobile which alleges that he delivered it to defendants, at their request, as bailees, and afterward demanded its return, which they failed, neglected and refused to make, though in a general form appropriate to an action for a conversion, is sufficient to sustain a recovery on the theory of the negligence of defendants, as bailees, in allowing the machine to be stolen from them.[17]

§ 26. Pledge.—It is a general principle of the law that to become the owner of a pledged article purchased by the pledgor under a conditional sale contract, the pledgee must complete the payments therefor.[17a] Hence, where the purchaser of an automobile under a contract of conditional sale pledges the machine, and the pledgee assumes the obligation of the contract of purchase, and his substitution is recognized by the vendor, who accepts him as his debtor in place of the original purchaser, it is the rule that there is a complete novation, the pledgee becomes entitled to the right and becomes subject to the liabilities of the conditional sale. While remaining free from default, he cannot be deprived of his interest or possession by any act of the vendor, such as accepting payment from the original purchaser and making a bill of sale, under his direction, to a fourth person. The pledge being evidenced by delivery of the car to the pledgee and by a visible, unequivocal, and continued possession as required by statute, his rights cannot be affected by any act of the pledgor subsequently assigning the contract of conditional purchase and wrongfully taking over the possession of the machine and delivering it to a person who had sufficient

17. Chastek v. Albertson, 32 Cal. App. Dec. 398, 191 Pac. 371. See, generally, CONVERSION; NEGLIGENCE.

17a. See PLEDGE; SALES; and references, infra.

notice to put him upon inquiry as to the wrongful taking. In such case, the fact that the pledgor had occasional possession and use of the machine in his capacity as an employee of the pledgee would not alter the rule, since any assumption of control or possession by him by virtue of any other claim of right, would be a violation of his pledge agreement. And the person taking such an assignment of the pledgor's contract of conditional purchase cannot claim the property as an innocent purchaser.[18]

§ 27. Lien for Repairs in General.—Under the provision of the Civil Code that

"A person who makes, alters or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges," etc.[19]

one who repairs an automobile at the request of an installment purchaser of the machine who is in possession of it under a contract of conditional sale is entitled to a lien thereon as against the vendor who retains title under the contract till the payment of the purchase price is completed. The installment purchaser, in such a case, is the legal possessor of the automobile within the meaning of the statute. The case differs from those cases under the statute where the lien is given to livery, boarding and feed stable proprietors and persons pasturing horses or stock, and which can be created only by the act of the owner, that is, the person retaining the legal title. Nor does the holding that an installment purchaser can create a lien

18. Manor v. Dunfield, 33 Cal. App. 557, 165 Pac. 983 (citing Civ. Code, § 2986, to the point that a delivery is necessary to the validity of a pledge; and Civ. Code, § 3440, as to sales unaccompanied by delivery or change of possession). See infra, § 47, as to distinction between pledge and conditional sale; and infra, § 245, as to larceny of automobile by pledgor. And see PLEDGE.

19. Civ. Code, § 3051. See note, 4 A. L. R., p. 361, as to validity, construction and effect of statutes which make owner responsible, or create a lien, for injury or damage inflicted by another operating an automobile. See, also, BAILMENT.

for repairs under the statute above quoted render its provisions unconstitutional, as the vendor in a contract of conditional sale must be deemed to know what rights he is conferring upon the purchaser under the law.[20] It has been held that a mechanic who has a lien for repairs upon a motor truck, dependent on possession, does not lose his lien because the owner of the truck obtains temporary possession of it without the mechanic's knowledge or authority and, on returning it, disclaims any intention of interfering with the lien. Nor is such lien lost because the truck is used for a time in the owner's business, though operated by a driver in the mechanic's employ, to whose possession it is returned each evening; nor because the owner of a truck causes the truck to be driven into the garage of a third person where, under the owner's instructions, it is retained for a time until the mechanic reclaims it.[1]

§ 28. Recovery for Repairs.—One who has a lien for repairs on an automobile which has been taken from his possession in replevin proceedings is entitled to a judgment for a return of the machine or for the amount of his lien if a return cannot be had, but not for the full value of the car. A finding that repairs to an automobile were of the reasonable value "of a sum in excess" of that tendered in payment by the owner, being so construed as to support a judgment for the lien claimant for possession of the machine, must be held to be a finding that the reasonable value of the repairs was a sum substantially in excess of that tendered. An answer by the lien claimant filed in the replevin proceedings against him, which denies that the amount claimed by him is grossly or at all exces-

20. Davenport v. Grundy Motor Sales Co., 28 Cal. App. 409, 152 Pac. 932. See infra, § 49, as to encumbrances created by conditional purchaser in general. And see LIENS; SALES.

1. Griffith v. Reddick, 41 Cal. App. 458, 182 Pac. 984. See LIVERY-STABLE AND GARAGE KEEPERS, as to rights of garage-keepers in general.

sive, and alleges that the repairs were reasonably worth in excess of the sum tendered by the machine owner, and denies that this latter sum is their reasonable value, will not be construed as admitting that the value of the repairs was not substantially in excess of the amount tendered, though certain of the averments if torn from their context, constitute a negative pregnant implying such an admission.[2]

Insurance.

§ 29. In General.—A policy of insurance issued to an automobile dealer, covering his equity in machines sold under contracts of conditional sale, covers also the interest due on deferred payments, as provided in the conditional sale contracts. And where the policy provides that any act of the assured in saving or recovering the property shall be considered as done for the benefit of all concerned, and that all reasonable expenses thus incurred shall be a claim under it, the policy covers detective fees paid out in an effort to locate a stolen automobile. It has been held that a letter written by an insurance company to an automobile dealer several days before a policy was issued to him, advising him that the company would extend its policy to cover the stealing of machines by a conditional purchaser, is to be deemed a part of the contract of insurance. Though such a policy, when issued, excepts from its risks the "wrongful conversion" of a machine by a conditional purchaser, the word "steal," when so used, will be taken in its colloquial sense of any wrongful appropriation, and hence the insurance will cover a wrongful conversion of a machine by the conditional purchaser, though not technically a larceny.[3]

2. Connell v. Hogg, 181 Cal. 730, 186 Pac. 134.

3. Buxton v. International Indemnity Co., 32 Cal. App. Dec. 317, 191 Pac. 84. See supra, §§ 22, 23, as to jitney bus insurance; infra, §§ 46–54, as to conditional sales in general; and infra, § 245, as to larceny of automobile.

§ 30. Warranties and Representations.—Under the statutory provisions that a statement in an insurance policy of a matter relating to the thing insured, as a fact, is an express warranty thereof,[4] and that a breach of warranty, broken in its inception, prevents the policy from attaching to the risk,[5] and that a policy may declare that a violation of specified provisions thereof shall avoid it, but that otherwise a breach of an immaterial provision does not avoid it,[6] and under a provision in a valued policy of automobile insurance that any violation of any warranty shall immediately avoid it, it has been held that the year of manufacture of the machine is such a material part of its description that the misstatement of it, as of a year later than the true one, constitutes a breach of the warranty that the thing insured has been properly described. The warranty being thus breached, the materiality of the breach itself is not, under the statute, open to consideration. Nor is the invalidity of the policy on this account cured by the fact that further misdescriptions of the machine, as to number of cylinders and horse-power, were inserted in the policy by the insurer itself. Nor would the fact that the policy was afterward renewed on the original application render the renewed policy valid. Hence, a misrepresentation in an application for a valued policy of insurance, that the automobile was built in 1909 and cost the insured at second hand thirty-five hundred dollars, when in fact it was built in 1907 and cost twenty-five hundred dollars, is a material misrepresentation of fact, and is not to be viewed as a mere overestimation of value which, in an open policy, is not necessarily fatal. It has been held that the fact that the court found the actual value of the machine to be three thousand dollars does not render the misrepresentation as to the price paid immaterial, under the statute.[7]

4. Civ. Code, § 2607.
5. Civ. Code, § 2612.
6. Civ. Code, § 2611.
7. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859 (holding that under Civ. Code, § 2565, the

§ 31. Reformation of Policies.—Under the rule that the sale of insurance is analogous to the sale of goods, if one purchasing automobile insurance does not get a policy covering the risks he intended, but, nevertheless, retains the policy and does not request another of the kind originally sought, or offer to pay the increased premium necessary to secure it, he will be deemed to have accepted the policy issued, and cannot afterward have it reformed to cover the intended risks. Thus, where an automobile owner mistakenly applied for insurance indemnifying him against liability to others, instead of insuring him against loss on his own account; and after being notified by the company that his policy was not of the latter character and that claims for his own losses would not be recognized, nevertheless retained the policy without seeking its amendment or offering to pay the additional premium necessary to get the insurance he desired, he was held to have acquiesced in the policy as issued, and could not afterward recover for an injury to his own machine in case of a collision, or ask for reformation of the policy and judgment for damages for the collision. A casual remark by a company official that the insured had paid all he had been asked to pay and evidently did not get what he should have got would not, it has been held, amount to an agreement to extend the policy to injuries to the insured's own machine, in view of the repeated statements of company officers that this would not be done. Nor would the company be estopped to contest subsequent losses, by the payment of a slight loss of the insured's own, as a matter of courtesy only.[8]

In a policy designed to cover the theft of an automobile, it has been held that the word "steal" in an automobile

materiality of representations is not to be determined by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due). See infra, § 33, as to responsibility for representations made by brokers. And see INSURANCE.

8. Browne v. Commercial Union Assur. Co., 30 Cal. App. 547, 158 Pac. 765.

dealer's policy may be given its colloquial meaning of any wrongful appropriation, such as a conversion by an installment purchaser, and that it is not necessary to reform the instrument.[9]

§ 32. **Waiver of Proofs of Loss.**—Where an insurance company which has insured an automobile dealer against the wrongful conversion of automobiles by conditional purchasers, after receiving notice of such a loss and within the time allowed for furnishing proofs, denies liability on the ground that the policy does not cover the case, it thereby waives proofs of loss. Nor will the fact that the clause covering such a case was contained in a letter accompanying the policy and not in the policy itself, or the fact that the company in denying liability had in mind the terms of the policy only, affect the efficacy of the waiver, since the company is supposed to know that in legal contemplation a letter so sent is a part of the policy.[10]

§ 33. **Insurance Agents and Brokers.**—An insurance agent appointed in writing "for the transaction of automobile insurance in . . . , subject to such instructions as may be given . . . from time to time," the appointment also including the statement, "Policies will be written at this office" (that is, the company's general office), and who, acting under such appointment, makes out applications which are forwarded to the general office where, if accepted, policies in accordance with them are returned to the agent for delivery to the insured, is not a general agent having authority to bind the company by a completed contract of insurance, but is a mere soliciting agent,

9. Buxton v. International Indemnity Co., 32 Cal. App. 317, 191 Pac. 84.

10. Buxton v. International Indemnity Co., 32 Cal. App. 317, 191 Pac. 84. See supra, § 29, as to the effect of letters accompanying the policy. See 3 A. L. R., p. 793, as to recovery of car as affecting insurance covering theft of automobile.

whose powers are confined to negotiating and preparing applications only, and who, therefore, cannot bind the company by anything he may say or do during such preliminary negotiations. The phrase, "Policies will be written at this office," must be construed to mean that contracts of insurance will be consummated only at the general office of the company.[11] It has been held also that insurance brokers who were not the regular agents of an insurance company and with which they never had any dealings except in the single instance in which they filed with the company an application for automobile insurance sent them by an agent whose correspondents they were, and who was acting for the insured, were the agents of the insured and not of the company, and that the insured is responsible for misrepresentations made by them in the application. Nor does it alter the case where the brokers retain a commission for placing the insurance, if it appears to be the custom for independent brokers thus to act. This would not make the brokers agents of the company. Moreover, the law in California goes further, and makes the insured responsible for misrepresentations in the application when it is drawn by a regular soliciting agent of the insurance company, where the agent has no authority to waive the provision of the application that the policy is to be avoided if any misrepresentation has been made of a material fact.[12]

§ 34. Actions on Policies.—An action to recover under a policy of automobile insurance against theft is a civil action, and the plaintiff is required to prove his case, including the theft, only by a preponderance of the evidence. In an action by an automobile dealer on an insur-

11. Browne v. Commercial Union Assur. Co., 30 Cal. App. 547, 158 Pac. 765. As to insurance agents and brokers generally, see INSURANCE.

12. Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859. See AGENCY, vol. 1, p. 712 et seq., as to the authority of agents generally and limitations of their authority. And see INSURANCE as to misrepresentations of solicitors generally.

ance policy covering the wrongful conversion of an automobile by a conditional purchaser, it is sufficient, as against a general demurrer, to allege the wrongful conversion and embezzlement on information and belief, that form of allegation being authorized by section 446 of the Code of Civil Procedure. In such a complaint; an allegation that the policy was against loss "caused by the wrongful conversion" of the machine by the conditional purchaser,—the contract of insurance itself using the word "steal,"—places in issue the question whether the parties, by the word "steal," did not intend to cover wrongful conversion; and a finding that they did so is therefore within the issues.[13]

§ 35. Exemption from Execution.—The statutory exemption from execution under subdivision 6 of section 690 of the Code of Civil Procedure, of "two horses, two oxen or two mules, and their harness, and one cart or wagon, one dray or truck, one coupé, one hack, or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living," does not cover motor vehicles.[14] Concerning this statutory provision, the district court of appeal has said: "If the legislature intended that a motor vehicle should be exempt . . . we think that it would have so declared in plain terms, and that for the courts to add to the statute any article not enumerated would in effect be judicial legislation."[15] Accordingly, a

13. Buxton v. International Indemnity Co., 32 Cal. App. 317, 191 Pac. 84.

14. Crown Laundry & Cleaning Co. v. Cameron, 39 Cal. App. 617, 179 Pac. 525; In re Wilder, 221 Fed. 476.

15. Crown Laundry & Cleaning Co. v. Cameron, 39 Cal. App. 617, 179 Pac. 525 (holding that an automobile used by a laundry driver in collecting and delivering clothes is not exempt. The court cites an Iowa case, Lames v. Armstrong, 162 Iowa, 327, Ann. Cas. 1916B, 511, 49 L. R. A. (N. S.) 691, 144 N. W. 1, in which it was held that an automobile was exempt, but points out that the Iowa statute contains the general terms "or other vehicle"). See discussion in 3 Cal. Law Review, pages 49, 422,

taxicab, owned by a hackman and by which he makes his living, is not exempt under the statute; and consequently, it cannot be claimed as exempt in bankruptcy proceedings.[16]

§ 36. Damages for Injury.—The owner of an automobile damaged in a collision is not precluded from recovering for the injuries by the fact that he has not yet paid out any money, or incurred any indebtedness for replacements or repairs. The rule that in suits for injuries to the person no recovery can be had for physicians' services unless such bills have been paid or liability incurred therefor, has no application to such a case, for reimbursement for physicians' charges is special damage, while injuries to property call for general damages. Though the measure of detriment for a wrong, where the property is not totally destroyed, is, generally speaking, the difference in its value immediately before and after the injury, unless the injury can be repaired for less than the decrease in value, in which case damages are limited to the cost of repair, it has been held that the expense of repairs will be treated on appeal as the proper measure of damages to an automobile from a collision, when the case was tried in the court below on this theory without objection from the appellant (defendant on the trial), and where no offer was made to show that the diminution in value on account of the injury was in fact less than the cost of the repairs.[17]

§ 37. Damages for Wrongful Detention.—The measure of damages for being deprived of the possession of an

of the Iowa case above cited, and of exemption of an automobile as a "carriage" under the liberal rules of construction. These notes in the California Law Review were written, it will be observed, before the decision was rendered in the Crown Laundry case cited supra.

16. In re Wilder, 221 Fed. 476. See note, 2 A. L. R., p. 827, as to automobile as a tool or implement of trade within meaning of debtor's exemption laws.

17. Kincaid v. Dunn, 26 Cal. App. 686, 148 Pac. 235. See note, 4 A. L. R., p. 1350, as to measure of damages for destruction of, or injury to, commercial automobiles.

automobile depends upon the use the owner would have made of it had his possession been undisturbed. If he would have employed it for his convenience in his business, then its rental value would seem to be the proper criterion by which to determine the owner's damage from being deprived of it. But if he was holding it for sale and would not have used it himself, then the depreciation in its market value during the period of detention might properly furnish the basis for the estimate of damage. In the latter case it would be incumbent on the owner to show the market value of the car both when it was taken from him and when it was restored to him. In no case could he recover for both the loss of its use and its depreciation in market value.[18] Neither the fact that the owner of an automobile used it for pleasure rather than business purposes, nor the fact that one wrongfully detaining it from his possession did not use it at all, would absolve the latter from compensating the owner for any detriment he actually sustained by the wrongful detention. Under the provision of section 3359 of the Civil Code that damages must be reasonable, and that where an obligation appears to create a right to unconscionable and grossly oppressive damages, no more than reasonable damages can be received, the owner of an automobile should not be allowed to recover for its wrongful detention a sum out of all proportion to the value of the machine itself. Otherwise, the result is not compensation for actual loss, but the infliction of exemplary damages in a case where they might not be properly allowed. The amount to be allowed is the market value of the use of the machine, but this means net usable value, that is, the gross rental value less the expenses of upkeep. The owner cannot recover for the wrongful detention the gross rental value of a fully equipped and maintained car, free from all expense of maintenance, repairs and natural wear and tear, such as a

18. Morneault v. National Surety Co., 37 Cal. App. 285, 174 Pac. 81.

rented car would naturally be subject to.[19] Since to make the sum an owner paid for his automobile more than slight evidence of value, a collateral inquiry would be necessary as to whether he had not paid too much, such evidence, it is said, is of doubtful competency. However, it may have some probative value, and will, when received without objection and in the absence of any counter-testimony whatsoever, sustain a finding, especially where no question on the point was raised in the trial.[20]

Sales and Sales Agencies.

§ 38. Contract of Sale in General.—A bill of sale is not essential to the transfer of an automobile, but merely constitutes evidence of the sale.[1] Where one purchases an automobile from a vendor, who himself holds it under a contract of conditional sale, and gives a post-dated check in payment to an agent of the vendor, who thereupon completes the payments, procures a bill of sale, and delivers it to the purchaser, the transaction is essentially one between the vendor and the purchaser only. And when the purchaser, before the check given by him falls due, effects a rescission of the sale with his vendor, returns the machine to him and stops payment of the check, he thereby loses all right to the machine and cannot afterward recover possession of it. In such case, it has been said, a complete rescission of the sale was effected, although the check had not been redelivered for cancellation.[2]

§ 39. Purchase by Agent.—A real estate corporation employing numerous salesmen and using automobiles as

19. Mutch v. Long Beach Imp. Co., 32 Cal. App. Dec. 89, 190 Pac. 638 (holding that a recovery of $1,297.50 for the wrongful detention of a car for eighty-six and a half weeks, the value of which was but four hundred dollars to start with, is improper under this rule).

20. Sanders v. Austin, 180 Cal. 664, 182 Pac. 449.

1. Greene v. Carmichael, 24 Cal. App. 27, 140 Pac. 45. See SALES.

2. Alchian v. McDonald, 40 Cal. App. 505, 181 Pac. 77.

an almost indispensable adjunct to its business, will be regarded both as having conferred ostensible authority on its secretary to purchase an automobile and to have ratified his act, when it appears that the secretary held himself out to be, and in fact was, one of the company's managers, that the company took the car into its service, used it, paid two installments of the purchase price, had repairs made on the machine and paid for them, and assumed ownership in an endeavor to exchange the automobile with the seller for another type of car. Under such circumstances, it has been held that the company would be estopped to repudiate the agreement of purchase. And where the seller, in suing for the purchase price, alleges the purchase by a corporation, and where the company denies such purchase by it and endeavors to show want of authority in its secretary to make the purchase, it has been held that rebuttal proof of ostensible authority, estoppel and ratification may be given by the seller without pleading these elements of the transaction specially.[3]

§ 40. Purchase by Wife as Agent of Husband.—An automobile not being one of those necessaries which a wife is authorized to purchase upon her husband's responsibility, it follows that she has no implied authority to represent him in the making of such a purchase, and her statements during the transaction do not bind him.[4] Yet when a wife purchases an automobile in her own name, but trades in a machine belonging to her husband as part of the price, gives a check for a further amount signed in her husband's name "by" her, and executes her personal note for the balance, and the husband does not seek to reclaim his old machine nor repudiate the check,

3. Meister & Sons Co. v. Wood-Tatum Co., 26 Cal. App. 584, 147 Pac. 981 (applying Civ. Code, §§ 2318, 2319). See AGENCY, vol. 1, pp. 734, 766.

4. Roullard v. Gray, 30 Cal. App. 757, 159 Pac. 457. See HUSBAND AND WIFE.

but uses the new car and pays for repairs on it, and in a subsequent divorce action alleges under oath that it is his separate property, the evidence is sufficient to charge him as a purchaser for a balance due, and this has been held true, though the seller carried the account in the wife's name.[5]

§ 41. Delivery.—A written contract for the sale of an automobile which provides that delivery is to be made "on or about out of first shipment of this model" received by the vendors from the factory, means that delivery must be made within a reasonable time.[6] An automobile dealer who notifies a purchaser that the machine agreed to be purchased is at his place of business and is "delivered in accordance with the agreement of sale," and who offers it to the purchaser with intent to pass the title, and thereafter holds the automobile for the purchaser's use and benefit, the purchaser being entitled at any time to have full and unrestricted use of it, has made, it has been held, a delivery of the machine effective to pass the title, within the provision of section 1141 of the Civil Code.[7]

It has been held that the fact that a motor company transferred its plant, assets and goodwill to another, constitutes no defense to the payment of a note given in the purchase of an automobile which the defendant received and retained for his use and benefit, it not appearing that its assignee was not in a position to carry out the contract had the payor so requested.[8]

§ 42. Refusal to Accept—Remedies.—The fact that a seller of an automobile which the purchaser refused to accept and pay for did not have cars on hand at the time

5. Roullard v. Gray, 38 Cal. App. 79, 175 Pac. 479. See infra, § 59, as to purchase by wife good as against husband's creditors.

6. Boland v. Smith, 32 Cal. App. Dec. 189, 191, 190 Pac. 825. See SALES.

7. Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681.

8. McKey v. MacIntosh, 31 Cal. App. Dec. 284, 188 Pac. 310. See infra, § 60, as to admissibility of oral evidence to show agreed date of delivery.

of refusal is immaterial to his recovery, where he could have procured them in a reasonable time if the buyer had indicated his willingness to receive them, and especially where it appears that the parties intended to follow that method of procedure.[9] Though an automobile dealer who has notified the purchaser of a machine that it is at his place of business and has offered it to the buyer and thereafter holds it for his use has the right to sell it under his vendor's lien, provided he follows the procedure prescribed by the Civil Code (sections 3049, 3052), including the giving of notice to the purchaser (section 1503), he has no right to sell it without observing such procedure. If a sale is made pursuant to his right under the code, the dealer must credit the amount he receives in the unpaid purchase price, the Civil Code (section 1503) requiring that one offering a thing by way of performance must, if he means to treat it as belonging to the creditor, retain it in his possession as a depositary. The purchaser is not bound by an unauthorized sale, but upon payment of the price, if compelled to do so by judgment, would be entitled to the machine itself. A dealer's unauthorized act in selling the machine amounts to a conversion of the purchaser's property for which the buyer might have damages. The latter cannot be compelled to accept in lieu thereof the price which the dealer received.[10]

A contract between a seller and purchaser whereby a certain proportion of the purchase price is deposited with a third person with instructions to pay a specified amount to the seller as each car is delivered, makes the depositary the agent of both parties, and entitles the seller, on tendering delivery of certain cars under the contract, to demand and receive of the depositary the appropriate sums therefor, and these sums the depositary then holds as agent for the seller, notwithstanding the fact that the buyer refuses

9. Thompson v. Hamilton Motor Co., 170 Cal. 737, Ann. Cas. 1917A, 677, 151 Pac. 122.

10. Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681. See SALES.

to accept the cars. The depositary is not, in such case, obligated under the provisions of section 1822, and following, of the Civil Code to return such sums to the depositor upon his making a demand therefor. But where the seller, on the purchaser's refusal to accept delivery, proceeds to hold him for the full purchase price without resorting to the deposit, and recovers judgment against him without deduction on that account, he thereby waives the liability of the depositary to himself.[11] It has been held that the measure of damages to an automobile dealer for a purchaser's failure to pay for a machine which the dealer holds for the buyer is the contract price which the buyer agreed to pay; there being no question of fraud, the actual value of the machine is immaterial.[12]

§ 43. Actions for Refusal.—In an action by a seller for damages for a buyer's failure to take and pay for certain automobiles as agent, it has been held that an allegation that plaintiff's profit on each car would have been at least one hundred dollars, while subject in form to the criticism that it states a conclusion, is a sufficient allegation of damage as against a general demurrer, as it is equivalent to a statement that the price which defendant agreed to pay for each car was at least one hundred dollars more than the value of such car to the plaintiff, or, in other words, that plaintiff could have obtained each of the cars for one hundred dollars less than the contract price to defendant. This would be the detriment proximately caused to the plaintiff by the defendant's failure to buy, and is sufficient whether the case falls within the rule that the measure of damages for breach of contract is the amount that will compensate for all detriment proximately caused thereby, under section 3300 of the Civil Code, or within the rule stated in section 3311 of the code, that the detriment caused by breach of a buyer's agreement is if the

11. Foster v. Los Angeles T. & S. Bank, 36 Cal. App. 460, 172 Pac. 392.

12. Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681.

property has not been resold, the excess, if any, of the amount due from the buyer over the value to the seller. And where the allegation is traversed only by a negative pregnant denying that "the minimum profit was and is one hundred dollars per car," there is an admission that the profit would have been ninety-nine dollars and ninety-nine cents per car.[13] Where suit is brought for the price of an automobile, the title to which has passed to the purchaser, allegations in the complaint that the machine had no market value are not material to the case. In such case it has been held that inasmuch as the effect of the admission of testimony showing the sale of the property had just before the trial would be to compel the vendee to accept, in lieu of damages for conversion, the price claimed to have been obtained for the automobile and which the court credited him with, it cannot be said that the error in admitting such evidence was without prejudice where it does not appear that the sale was made with the vendee's consent.[14]

§ 44. Turning in Old Machine.—One who turns in an old automobile as a specified part of the purchase price of another machine, under an agreement by which, if it is not sold for his account within a stipulated time, he shall have an option to repurchase it at an increased price, has a reasonable time after the expiration of the time allowed under the agreement in which to exercise the option. And when extensive repairs are made on the old machine as contemplated by the contract, the reasonable time in which to exercise the option does not expire until the repairs are finished and a statement of them made to the owner. If the old machine is sold after the stipulated period has expired, but before the option has been exercised, the purchaser is entitled to a credit of the amount for which it was sold, less the difference between the credit originally

13. Thompson v. Hamilton Motor Co., 170 Cal. 737, Ann. Cas. 1917A, 677, 151 Pac. 122.

14. Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681.

given on account of it and the price of repurchase.[15] It has been held that an expert motor car man who personally examined an automobile offered to him in exchange, and fixed his own value on it for the purposes of the transaction, no representation having been made to him by the owner, cannot afterward complain that there was a lack of evidence to sustain the finding of the court that it was worth the amount allowed.[16]

§ 45. Warranties.—Any distinct assertion or affirmation as to the quality or character of the thing sold, made by the seller during the negotiations for the sale, which it may reasonably be supposed was intended to induce the purchase and was relied on, will be treated as a warranty.[17] Thus, repeated express assurances to the prospective purchaser of a motor truck that it will carry a specified weight, upon which assurances alone he makes the purchase, will constitute a warranty. Nor will it alter the case that the purchaser was more or less familiar with automobiles, that before purchasing he inspected the truck, and that he was present at a demonstration of it without a load, though afforded no opportunity to learn its carrying capacity.[18] And in a case where a purchaser knew little or nothing about automobiles, but had confidence in the sale's agent, whom he knew, and during the negotiations for a sale the agent represented as a fact and not as an expression of opinion that the proffered automobile was "a 1912 model," in order to induce the purchaser to buy which he did, relying on the representation,

15. Lee v. De La Motte, 31 Cal. App. Dec. 1005, 189 Pac. 1034.

16. Luckenbach v. Smith, 14 Cal. App. 139, 111 Pac. 266. See supra, § 25, as to liability of dealer as a bailee who takes care of prospective purchaser to try out before deciding what allowance to make on it; and infra, § 61, as to oral evidence of promise to get certain price for car turned in.

17. Hackett v. Lewis, 36 Cal. App. 687, 173 Pac. 111; Morris v. Fiat Motor Sales Co., 32 Cal. App. 315, 162 Pac. 663. See infra, §§ 55–58, as to fraudulent misrepresentations. And see SALES.

18. Hackett v. Lewis, 36 Cal. App. 687, 173 Pac. 111.

it constituted an express warranty.[19] And where the seller of an automobile has warranted it against defects in material or workmanship for a specified time, and covenanted to replace defective parts free of charge, the time when the breach of the warranty is first discovered is properly taken as the time for fixing the amount of damage, though attempts at repairs by the seller, together with continued use of the car by the purchaser, are continued for more than a year thereafter before suit is brought, upon its finally becoming apparent that the warranty cannot be made good, the warranty itself contemplating that the car should be continually used and defects remedied as they were disclosed.[20]

Pleading.—While it is true that an express warranty, to be available, must be pleaded, this does not mean that the word "warranty," or any particular form of words, must be used. Thus, a complaint to rescind the purchase of an automobile, which alleges that the seller falsely represented it to be "a 1912 model" when in fact it was a 1911 model, and that the purchaser wholly relied on that representation in buying, sufficiently alleges an express warranty.[1]

§ 46. Conditional Sales in General.—As the ownership of a thing to be sold and transferred in the future need not be in the prospective seller at the time the sale's agreement is executed, it does not affect the validity of a contract for the conditional sale of an automobile that the seller does not then own the machine, title to which will not pass till all installment payments are completed.[2] A written contract for the sale of a motor vehicle, preliminary to the finished transaction, which provides for pay-

19. Morris v. Fiat Motor Sales Co., 32 Cal. App. 315, 162 Pac. 663.

20. Moss v. Smith, 181 Cal. 519, 185 Pac. 385.

1. Morris v. Fiat Motor Sales Co., 32 Cal. App. 315, 162 Pac. 663.

2. Smith v. Semon, 32 Cal. App. 640, 163 Pac. 1038. As to the law of conditional sales generally, see SALES.

ments in installments, has been held to be abrogated by a written lease executed subsequently and constituting the final agreement between the parties, by which the purchaser leases the vehicle for the specified installments, termed therein as rent, and at the end of the term has the right to buy it for a stated amount. In such case, the purchaser's attempted rescission of the preliminary contract and return of the vehicle are ineffectual to rescind the actual sale of the machine as evidenced by the lease. The case is quite different from an attempt to turn a sale already executed into a conditional sale, and does not come within the rules preventing such a transaction.[3]

§ 47. Nature of Contract—Seller's Remedies.—A contract for the conditional sale of an automobile, under which possession is delivered to the purchaser but title is retained in the seller until all deferred payments are completed, does not constitute a chattel mortgage, under section 2920 of the Civil Code, since property can be hypothecated only by its owner, and under the terms of such a contract the purchaser is not the owner until all payments have been made; nor can the seller be at once owner and mortgagee of the machine, since one cannot hold a mortgage on his own property. Nor does such a conditional sale contract create a vendor's lien in favor of the seller, as such lien is defined by section 3049 of the Civil Code, since, under the contract, the seller no longer has possession of the automobile, and, besides, one cannot have a

3. Hogan v. Anthony, 34 Cal. App. 24, 166 Pac. 861. For a case where a memorandum in the form of a lease was held to constitute a conditional sale contract, see Crawford v. Meadows, 41 Cal. App. 13, 181 Pac. 845. And see Greene v. Carmichael, 24 Cal. App. 27, 140 Pac. 45, for a case where an employer purchased a car for an employee on conditional sale, the employee having possession under an executory contract to purchase it from his employer. See infra, § 59, as to conditional sales in fraud of creditors.

See note, A. L. R., p. 1596, as to forfeiture of automobile by innocent vendor when sold conditionally and used by vendee in violation of law.

lien on property of which he is the owner. Nor does such a contract create a pledge of the machine to the seller, within the provisions of section 2988 of the Civil Code, inasmuch as the lien of a pledge is dependent on possession in the pledgee.[4]

Since under a conditional sale contract the title remains in the seller until the purchase price is paid, it is clear that where there is absolutely nothing in the record showing that title had passed to the conditional purchaser, the seller has a right of action to recover possession of the automobile, as by claim and delivery;[5] or, without action, he may retake possession of the property.[6]

§ 48. Rights of Conditional Purchaser.—The vendee in a contract of conditional sale of an automobile is entitled to possession of the property until he makes default under the contract, and the vendor, though holding the legal title, cannot take it away from him.[7] Yet where a conditional sale contract of an automobile expressly reserves title in the seller till the purchase price is fully paid, it has held that a finding that the seller is not entitled to possession of the machine because installments to the date of suit have been paid by certain credits to which the purchaser is entitled, does not justify a further finding that the seller is not the owner.[8] The purchaser of an automobile under a contract of conditional sale who, without the seller's consent, removes it from the state and effectually conceals it, and fails to comply with the seller's demand for the payment of installments due or the return of the car, is properly found to have wrongfully converted the machine.[9]

4. Standard Auto Sales Co. v. Lehman, 30 Cal. App. Dec. 394, 186 Pac. 178. As to nature of conditional sales generally, see SALES.

5. Crawford v. Meadows, 41 Cal. App. 13, 181 Pac. 845; Rhoades v. Lyons, 34 Cal. App. 615, 168 Pac. 315.

6. See infra, § 53.

7. Manor v. Dunfield, 33 Cal. App. 557, 165 Pac. 983.

8. Lee v. De La Motte, 31 Cal. App. Dec. 1005, 189 Pac. 1034.

9. Buxton v. International Indemnity Co., 32 Cal. App. Dec. 317, 191 Pac. 84. See supra, §§ 29, 31.

§ 49. Encumbrances Created by Purchaser.—As it is a well-established rule that one in possession under a conditional sale contract cannot, by attempting to sell or create a lien upon the property, impair the rights or interest of the owner, the action of one in possession of an automobile under an executory contract of sale, title remaining in the vendor until the purchase price is paid, in mortgaging the machine to secure a promissory note, would not derogate in any manner from the vendor's rights. Therefore, an employer who buys an automobile for his employee under an agreement that his ownership shall continue until he is reimbursed for the purchase price is not estopped to assert his ownership against a chattel mortgagee of the employee's, by the fact that, unknown to him, the original bill of sale was taken in the employee's name, nor by the execution of the chattel mortgage, of which he was likewise ignorant. He has the right to assume that the employee would not mortgage property which he did not yet own, and hence he cannot be chargeable with negligence in not anticipating the execution of the mortgage, nor in failing to inquire about the bill of sale.[10] A contract of conditional sale of an automobile in which one who has obtained money through fraud has invested the proceeds of his wrong may be impressed with a trust in favor of the person defrauded, who may, by virtue of such involuntary trust, be decreed to have an equitable lien on the machine for the amount of his loss, though the title has not yet passed to the vendee under such contract.[11]

32, 34, as to dealer's insurance against wrongful conversion by conditional purchaser; and supra, § 47, as to seizure by owner when purchaser has removed machine from county.

10. Greene v. Carmichael, 24 Cal. App. 27, 140 Pac. 45. See infra, §§ 88, 94, as to liability of owner for negligent operation by conditional purchaser. See SALES.

11. Carter v. Holt, 28 Cal. App. 796, 154 Pac. 37.

§ 50. Assignment by Seller.—A blank notice of assignment attached to a contract for the conditional sale of an automobile at the time of its execution by the purchaser, which recites that the only authority retained by the seller is to receive payments as the agent of the assignee, and that all other dealings must be had with the assignee, is insufficient to constitute notice to the purchaser of a subsequent assignment of the contract by the seller, so as to cut off subsequent defenses otherwise available to the purchaser, under section 386 of the Code of Civil Procedure, to the effect that assignments of things in action are without prejudice to defenses existing at or before notice of the assignment. Nevertheless, the blank notice of assignment attached to the sales contract, and its recitals, the seller's remark to the purchaser at the time of the contract's execution that he intended to assign it, and conversations had between the parties after the assignment, may, taken together, be sufficient to put the purchaser upon inquiry as to what had become of his contract, and, therefore, may amount in legal effect to notice of the assignment so as to preclude the purchaser's defense, when sued by the assignee for the balance due, that, subsequently to the assignment, he had made a settlement with the original seller.[12]

§ 51. Assignment by Purchaser.—One who takes an assignment of a contract for the conditional purchase of an automobile, knowing that the money already invested had been acquired by his assignor through fraud, and who afterward makes a further payment on the contract, is entitled only to a junior lien for such payment, as against the person from whom the money first invested was fraudulently obtained. And when the assignee, knowing of the fraud, takes the contract to the original seller, who ap-

12. Smith v. Semon, 32 Cal. App. 640, 163 Pac. 1038. See infra, § 52, as to defense that purchaser is in default, where he sues seller's assignee for possession of machine. See in general, ASSIGNMENTS.

proves the assignment and releases the original purchaser from further liability, the assignee then making further payments, the court, in a suit by the person defrauded to impress a trust on the contract, is justified in treating as a mere subterfuge a second contract, similar in terms, conditions and amounts, made directly with the original seller and the assignee by agreement between them and the original purchaser after the three have attempted to cancel the first contract. An allegation in the complaint of the person defrauded that the assignee took the assignment with knowledge "that said automobile had been purchased with plaintiff's money and funds" is sufficient, as against a general demurrer, to charge that the assignee took the contract with knowledge of the complainant's rights. And a finding that the assignee presented the contract to the original seller who approved the assignment, whereupon the assignee made additional payments, and that afterward the original seller, knowing of the fraud, attempted to rescind the contract, is sufficient to negative an averment in the assignee's answer, that he later obtained the machine from the original seller by a direct and independent contract of purchase.[13]

§ 52. Default in Payment in General.—It has been held that where the purchaser sends a money order to the seller for an installment of the price, two days before it is due, in ignorance of the seller's assignment of the contract, and the seller forwards the order to his assignee, who receives it on the day it is due, there is no default, though the assignee afterward returns the order to the seller with instructions to indorse it to a collection agency to which he had assigned the contract, and the seller attempts to deliver the order to the agency but fails to do so. In an action in claim and delivery to recover a car from a conditional purchaser alleged to be in de-

13. Carter v. Holt, 28 Cal. App. 796, 154 Pac. 37. See infra, § 59, as to assignment in fraud of creation.

fault, the right of the plaintiff to recover depends upon the existence of the cause of action at the time of the commencement of the action, and if the defendant claims that the plaintiff has subsequently lost the right, such fact must be shown by supplemental answer. The fact that a plaintiff in such an action defaulted in the payments due to a third person after the action was commenced, would not defeat the action where the facts showing such default were not set up by supplemental answer. Without such supplemental answer the answer of the defendant will be construed as corresponding to the allegations of the complaint in that it would relate only to the time of filing the complaint.[14]

§ 53. Seizure of Automobile by Seller.—The acceptance, by a seller of an automobile under a conditional sale contract, of partial payments after the purchaser was in default for the entire price will not bar the seller's right to retake and resell the property.[15] A contract by which the owner of an automobile leases it to another for a stipulated monthly rental in addition to a lump sum paid at the execution of the instrument, may be so framed as to give to the owner of the automobile the absolute right to terminate the contract and retake the machine when a default in payment occurs, whether the contract be viewed as a lease or a conditional sale. Nor is his right to the machine affected by the fact that after retaking possession of it, he sues on certain of the notes on which the lessee was previously in default and recovers judgment, where, under the terms of the contract, his right to enforce the notes already due was concurrent with, and not alternative to, the resumption of possession.[16] Where the purchaser of a motor truck under a conditional sale agreement refuses to pay the next accru-

14. Rhoades v. Lyons, 34 Cal. App. 613, 168 Pac. 385.

15. Magee v. W. J. Burt Motor Car Co., 37 Cal. App. 737, 174 Pac. 687.

16. Adams v. Anthony, 172 Cal. 158, 172 Pac. 593.

ing installment, claiming that the truck is not as represented, and the seller thereupon declares his intention to take the truck, to which the purchaser agrees and delivers over the machine, the facts show a seizure of the truck by the seller for nonpayment of an installment of the purchase price, and not a rescission by the purchaser of the contract of sale.[17] As a contract of conditional sale of a motor vehicle does not constitute either a mortgage, a lien, or a pledge, it does not prevent the seller resorting to the general remedy of attachment against the purchaser's other property to recover defaulted payments, the statute governing attachments authorizing attachments in suits on contracts "not secured by any mortgage or lien upon real or personal property, or any pledge of personal property," unless the security has become valueless.[18]

§ 54. Right of Purchaser to Complete Purchase.—In California a purchaser under a contract of conditional sale who has had possession of the property taken from him on account of his default may still complete the purchase and perfect his right to the property, on the theory that default in the mere payment of money is ordinarily capable of exact and entire compensation and will not, unless time has been expressly made of the essence of the obligation, bar the right of the party in default to tender payment, with interest, at a later date. In a case where the seller of an automobile under a conditional sale contract providing, as to deferred payments, that time shall be of the essence, and that the purchaser will return the machine, on request, at any time before the purchase is completed, retook the machine after the purchaser has been in default three months, and hold it seven months longer before reselling it, during which the purchaser made no further tender, it has been held that the seller cannot be held

17. Hogan v. Anthony, 34 Cal. App. 24, 166 Pac. 861.

18. Standard Auto Sales Co. v. Lehman, 30 Cal. App. Dec. 394, 186 Pac. 178. See supra, § 47, as to nature of conditional sale contract. See ATTACHMENT.

liable to the purchaser for a conversion of the machine. To protect his rights as a defaulting purchaser under a conditional sale contract, the purchaser must make reasonably prompt tender of performance.[19]

§ 55. Fraud in Sales in General.—While it may be true that the desire of purchasers of automobiles to procure the very latest models, without particular reference to the character of the improvements, is a fad, nevertheless, one paying the money is entitled to gratify even a whim, and to have the precise thing he contracts for; and where, in addition, it appears that, without reference to the differences between the models of various years, there is a marked difference in the market price between the current model and that of the preceding year, it cannot be said that the fraudulent sale of an older model for a later one works no material injury.[20] Telling a purchaser who has contracted for a new automobile that a second-hand machine delivered in its stead is a new car, and that a fresh contract tendered for his signature is similar to a former one except as to payments, when it is in fact entirely different, and in terms a lease, constitute fraud, the misrepresentations not being expressions of opinion but of fact.[1] Evidence that an automobile dealer assured a purchaser unfamiliar with automobiles that a car was the latest model of the current year and had all the latest improvements, that the only difference between it and the preceding model was in the oiling system, and that the reason he had it in stock so early was because he had received an advance shipment, all of which was false, and that he had told a third person that he was selling cars of the preceding year as new cars, and requested him not to say that he had seen the new ones, has been held to amply

19. Magee v. W. J. Burt Motor Car Co., 37 Cal. App. 737, 174 Pac. 687. See SALES.

20. Luckenbach v. Smith, 14 Cal. App. 139, 111 Pac. 266.

1. Knight v. Bentel, 39 Cal. App. 502, 179 Pac. 406 (evidence in this case was held to sustain findings for the purchaser).

justify a finding that the dealer's representations were knowingly false and fraudulent.[2]

§ 56. Independent Investigation by Purchaser.—Under the rule that whenever a positive representation of a material fact is made, the party receiving it is in general entitled to rely and act upon it, and is not bound to verify it by an independent investigation, the purchaser of an automobile who is assured as a fact that the machine is a model of a certain year may rely on the representation, though he had an opportunity to investigate the matter for himself, and might have discovered that it was an earlier model.[3] And the fact that the purchaser had the machine examined by experts of his own selection as to its general condition, but not as to the year of manufacture, does not preclude recovery for the misrepresentation.[4] Where the purchaser of an automobile, who had contracted for a new car, is tendered one in the evening and, after casually looking it over, is given a short ride in it, and then drives the machine that night to a neighboring town, where, the next morning, on making a thorough examination, he finds it to be an old, second-hand car, whereupon he immediately returns it and rescinds the contract of purchase, it has been held that there is no such acceptance and use with knowledge of the facts as will preclude his recovery of the purchase money paid.[5]

§ 57. Remedies of Purchaser.—When the purchase of a motor vehicle has been induced by false representations, the purchaser may rescind the contract and sue to recover the consideration paid and his damages in attempting to carry out the contract; or he may affirm the contract and

2. Luckenbach v. Smith, 14 Cal. App. 139, 111 Pac. 266. See supra, § 44, as to representations constituting warranties; and infra, § 61, as to evidence of oral representations or promises not amounting to fraud.

3. Morris v. Fiat Motor Sales Co., 32 Cal. App. 315, 162 Pac. 663.

4. Munn v. Earl C. Anthony, Inc., 36 Cal. App. 312, 171 Pac. 1082.

5. Knight v. Bentel, 39 Cal. App. 502, 179 Pac. 406.

sue for damages for the fraud.[6] And where, on discovering the fraud, he returns the car immediately, there is no waiver of the right to rescind the contract.[7] A purchaser of an automobile from one who fraudulently pretends to be its owner is entitled to recover not only the amount paid for the machine, but the amount expended for repairs he has put upon it in ignorance of the fraud.[8]

§ 58. Persons Liable for Wrongs.—When the purchaser rescinds the contract for fraudulent representations and sues to recover the consideration paid and the damages suffered, only the parties to the contract of sale and those in privity with them can be joined as defendants. Those participating in the fraud, but who are not themselves parties to the contract, cannot be joined. But the rule would be otherwise if the purchaser elected to affirm the contract and merely sues for damages from the fraud. In such case all those participating in the fraud would be liable.[9] One who fraudulently asserts title to an automobile and assists in its sale and transfer cannot escape responsibility merely because the bill of sale was signed only by one of his co-conspirators and not by himself.[10] The owner of an automobile who delivers possession of it to a pretended purchaser, who in fact is perpetrating a criminal fraud upon the owner in paying for the car with a worthless draft, is not estopped by such delivery from asserting title to the machine as against an innocent purchaser.[11]

6. Karst v. Seller, 31 Cal. App. Dec. 295, 188 Pac. 298. See infra, § 58, as to proper parties under either alternative.

7. Knight v. Bentel, 39 Cal. App. 502, 179 Pac. 406. See FRAUD AND DECEIT; SALES.

8. Ackerman v. Schultz, 178 Cal. 190, 172 Pac. 609; Locomobile Co. of America v. Belasco, 32 Cal. App. 329, 162 Pac. 920 (holding that fraud cannot be presumed, and that the burden of proving fraud in the sale of an automobile rests on him who asserts it).

9. Karst v. Seller, 31 Cal. App. Dec. 295, 188 Pac. 298. See SALES.

10. Ackerman v. Schultz, 178 Cal. 190, 172 Pac. 609.

11. Knapp v. Lyman, 30 Cal. App. Dec. 521, 186 Pac. 385. See supra, §§ 49, 51, as to trust im-

§ 59. Fraud as to Creditor.—To be valid against creditors of the seller, the transfer of a motor vehicle must be accompanied by immediate delivery and followed by actual and continued change of possession, as is required by section 3440 of the Civil Code.[12] Thus, a creditor of one who purchased an automobile under a contract of conditional sale may seize the machine under attachment, though prior to the levy the debtor, without delivering possession, assigned his contract of purchase to another, who completed the payments due and received a bill of sale therefor. Under such circumstances a debtor's transfer is in fraud of creditors under the statute. And since the debtor's assignee acquires no title as against the creditor, so one to whom the assignee in turn executes a bill of sale but who likewise fails to take the machine from the debtor's possession is also without right.[13] One who is sued for breach of warranty of title to an automobile, and for fraudulently representing himself to the purchaser as its owner, cannot defend on the ground that the title of the true owner to whom the purchaser lost the machine was acquired without being accompanied by change of possession and therefore in fraud of creditors under the statute; if, as the pretended owner, he was not a creditor of the original holder of the title, he was in no position to invoke the statutory provision.[14] The purchase by a debtor of a machine as "trustee," and his execution of note and bill of sale in the same fashion, is without weight in determining his ownership of the car as against his creditors, there being nothing in that form of transaction to indicate to others that he was not the owner and real purchaser.[15] But a married woman who purchases an auto-

pressed on contract of conditional sale on behalf of a person defrauded out of money used in making first payment.

12. Abrahams v. Hammel, 40 Cal. App. 11, 180 Pac. 41; Burns v. Hammel, 32 Cal. App. 214, 162 Pac. 669.

13. Abrahams v. Hammel, 40 Cal. App. 11, 180 Pac. 41.

14. Ackerman v. Schultz, 178 Cal. 190, 172 Pac. 609.

15. Burns v. Hammel, 32 Cal. App. 214, 162 Pac. 669 (evidence in this case was held to show fraud).

mobile under a contract of conditional sale, and makes the payments on it out of her separate property, her husband having no interest in the machine, is held to be the owner of the automobile as against creditors of the husband.[16]

§ 60. Parol Evidence to Vary Written Sales Contract in General.—Under the general statute providing that a written contract supersedes all negotiations or stipulations concerning its matter which preceded or accompanied its execution, as well as under the general rule that a purchaser of property under a written agreement, into which all preliminary understandings and assurances are presumed to be merged, cannot go behind the writing, the purchaser of an automobile under a written contract cannot complain of the breach of an oral assurance or representation.[17] And this is especially true where the written contract declares that all preliminary promises, verbal understandings or agreements, not specified therein, are expressly waived;[18] or where the contract recites that the seller will not be bound by such agreements or representations, and that the writing embodies the entire contract.[19] In this connection it has been held that a written contract employing a real estate agent to effect a sale of a residence property "completely furnished" does not include in such furnishing an automobile, and, further, that, the admission of parol evidence to show that such inclusion was intended by the parties is error.[20] But the rule does not preclude the admission of evidence showing the conditions under which a contract was en-

16. Rhoades v. Lyons, 34 Cal. App. 615, 168 Pac. 385.

17. Munn v. Earl C. Anthony, Inc., 36 Cal. App. 312, 171 Pac. 1082; Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 Pac. 906. See CONTRACTS.

18. Munn v. Earl C. Anthony, Inc., 36 Cal. App. 312, 171 Pac. 1082 (applying rule to verbal misrepresentation of year of manufacture).

19. Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 Pac. 906 (applying rule to assurance that car would be perfect and satisfactory).

20. Wright, Callendar-Andrews Co. v. Eaton, 32 Cal. App. Dec. 369, 191 Pac. 68.

tered into, inasmuch as the statute provides that for the proper construction of an instrument, the circumstances under which it was made may be shown.[1]

§ 61. Oral Representations not Amounting to Fraud.—The general principle excluding oral evidence to vary a written contract of sale does not, of course, prevent the avoidance of the contract for fraudulent misrepresentations which operate as the inducement for entering into it; and upon which the party injured or misled was entitled to rely. But where express stipulations against oral understandings are contained in the written agreement, which the purchaser freely and intelligently signed, a mere oral assurance that the car would be perfect and satisfactory would not amount to fraud.[2] And under the statutory provisions that a written agreement is to be considered as containing all the terms of the contract, and that no evidence of other terms can be adduced, except to establish fraud, etc.; and that where through fraud, accident or mistake, the written contract fails to express the true intent of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded, the purchaser of an automobile who signs a written contract allowing him a specified sum for an old car turned in, with such further amount as it might be resold for, cannot prove a positive oral promise of the salesman that he should have a credit for a larger sum than that specified, and that he—the salesman—would absolutely agree to get him that amount. The failure to perform such an oral promise would not amount to fraud within the definition of section 1572 of the Civil Code, that fraud may consist in "a promise made without any intention of performing it"; since under the provision the intent not to perform must exist when the promise is made.[3]

1. Boland v. Smith, 32 Cal. App. Dec. 189, 190 Pac. 825.

2. Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 Pac. 906.

3. Locomobile Co. of America v. Belasco, 32 Cal. App. 329, 162 Pac.

§ 62. Sales Agencies in General.—A dealer who sells automobiles only for cash, and who is not the agent of a corporation, cannot bind it to statements as to the car's condition. Nor would the fact that the corporation intrusted the conditional sale agreement and the accompanying notes by the dealer with instructions to have them executed by the purchaser, alter the case, where the dealer was thereby made the corporation's agent for that limited purpose only.[4] An agreement reciting that a motor-car company is engaged in the manufacture of cars and spare parts which it desires to sell, and that its correspondent proposes to engage in the sale and agrees to purchase a certain number of cars to be resold in a designated territory, and will not solicit orders outside, and that the company will not sell within the territory except through him, together with provisions that he shall maintain suitable storage quarters and carry a reasonable amount of supplies and spare parts, and that the company shall supply advertising matter mentioning him as engaged in the sale of its cars within the territory, etc., is held to create an agency for the sale of the company's cars, and is not merely a contract of sale, though it requires such correspondent to purchase three cars at a fixed price for delivery on a certain date. Especially is this true where in the correspondence, he is referred to as agent.[5]

§ 63. Authority to Bind Principal.—Under the well-established general rule that only those representations, declarations and admissions of an agent, respecting the subject matter of a transaction, will bind the principal which are made at the same time and constitute a part of the res gestae, statements of an automobile sales agent

920. See supra, § 55, as to fraudulent misrepresentations.

4. Umstead v. Automobile Funding Co., 30 Cal. App. Dec. 352, 185 Pac. 1011.

5. Schiffman v. Peerless Motor Car Co., 13 Cal. App. 600, 110 Pac. 460. See supra, §§ 39, 40, as to agents for purchase.

that the car sold was second-hand, and which were made long after the transaction was closed, are not admissible against the dealer.[6] An agent for the sale of an automobile who is instructed to sell for a fixed sum in cash, no delivery to be made until the money is paid, but who trades the car for another, acts beyond the scope of his agency, and the transaction is void as to his principal.[7]

§ 64. Ratification by Principal.—Under the code provision (Civil Code, section 2310) that ratification of an agent's acts can be made only in the manner necessary to confer an original authority, or, where oral authorization would suffice, by accepting the benefit of the act with notice thereof, a principal must have full knowledge of the actual transaction before his acceptance of a benefit can amount to ratification. Thus, an owner who has placed his automobile for sale with an agent does not ratify the agent's act in trading it for another machine, where, instead of informing his principal of the nature of the transaction, the agent tells him that he has exchanged it for another car and a considerable sum in cash which he forwards, and which the owner retains. Nor does the fact that a small part of the money retained by the owner may have represented a trifling cash bonus received by the agent on the actual trade, of which circumstance, however, the owner had no knowledge, affect the case. And a further reason why there could be no ratification lies in the fact that the transaction of which the owner was informed and to which he assented never took place.[8]

§ 65. Commissions.—In the absence of any trade usage to the contrary, an agent to whom an automobile manu-

6. Umstead v. Automobile Funding Co., 30 Cal. App. Dec. 352, 185 Pac. 1011. See AGENCY, vol. 1, p. 718.

7. Hutchinson v. Scott, Magner & Miller, 35 Cal. App. 171, 169 Pac. 415. See supra, § 44, as to representation by sales agent constituting warranty; and infra, § 94, as to responsibility of principal for sales agent's negligent operation of machine.

8. Hutchinson v. Scott, Magner & Miller, 35 Cal. App. 171, 169 Pac. 415. See AGENCY, vol. 1, p. 766 et seq.

facturing concern has given the exclusive right to sell its products within a given territory is not entitled to a commission on a sale made by the manufacturer to a resident of such territory, but negotiated and completed outside its boundaries.[9] But it has been held that an agent for the sale of motor trucks who was to have his commission on all sales brought about by him, no matter through what channels the order reaches his principal, is entitled to a commission on a sale resulting from his having interested the purchasing agent of a company in the trucks, though the company places its order for a machine with a firm of independent dealers in another city where it was to be used, such dealers having the exclusive right to sell the trucks in that locality.[10]

The measure of damages for the breach by a motor car manufacturing company of its contract not to sell its cars within certain fixed territory allotted to its agent except through him is that stated in section 3300 of the Civil Code, as that amount which will compensate the plaintiff for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. This is, however, subject to the limitation contained in section 3301 of the code, to the effect that no damages can be recovered which are not clearly ascertainable in both their nature and origin. Under this rule, an agent entitled to exclusive territory under a contract is entitled to recover the profits he would have made from the sale of the machine sold by his principal within his territory, had the principal either refused to invade his territory or referred inquiring purchasers to him as was agreed between them. There is nothing speculative or uncertain about these profits, and they are so closely connected with the principal's breach of obligation that they cannot be said to be too remote either in nature or origin.

9. Haynes Auto. Co. v. Woodill Auto Co., 163 Cal. 102, 40 L. R. A. (N. S.) 971, 124 Pac. 717; Parry v. American Motors etc. Co., 25 Cal. App. 706, 145 Pac. 165.

10. Swain v. Kleiber, 39 Cal. App. 341, 178 Pac. 728.

Moreover, the principal is estopped to deny that his agent would have made these sales had he not illegally invaded the agent's territory.[11]

IV. NEGLIGENCE IN OPERATION.

General Principles.

§ 66. Negligence in General.—Negligence in respect to the operation of automobiles, as under the law generally, is a comparative and not a positive term, and its use in any case or as to any party is relative, depending on the particular circumstances involved.[12] The same is true of "ordinary care."[13] Hence the degree of care which in one case would constitute negligence might in another be deemed more than prudence.[14] But where the law itself fixes a standard of care, negligence, it seems, becomes an absolute quantity.[15] The weight of authority supports the view that "negligence" and "willfulness" have distinct and well-defined meanings. Negligence is opposed to diligence, and signifies the absence of care. It is negative in its nature, implying a failure of duty and excluding the idea of intentional wrong. It follows that the moment a person wills to do an injury, he ceases to be negligent.[16] While it is true that the automobile is not in itself a dangerous instrument, nevertheless it demands

11. Schiffman v. Peerless Motor Car Co., 13 Cal. App. 600, 110 Pac. 460. See AGENCY, vol. 1, p. 808.

12. Regan v. Los Angeles Ice & Cold Storage Co., 31 Cal. App. Dec. 739, 189 Pac. 474; Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 Pac. 387; Shimoda v. Bundy, 24 Cal. App. 675, 124 Pac. 109; Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078; King v. Green, 7 Cal. App. 473, 94 Pac. 777. See NEGLIGENCE.

13. Fisk v. Poplin, 31 Cal. App. Dec. 786, 189 Pac. 722; Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 Pac. 287. See NEGLIGENCE.

14. Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078.

15. Regan v. Los Angeles Ice & Cold Storage Co., 31 Cal. App. Dec. 739, 189 Pac. 474.

16. Tognazzini v. Freeman, 18 Cal. App. 468, 122 Pac. 540 (holding that the term "willful negligence" involves a contradiction and is a misnomer).

a very high degree of care and skill in its management upon the highway.[17] Where an automobile driver is negligent in the operation of his car, the fact that his purpose at the time was benevolent is immaterial, for no purpose, however kindly, excuses negligence.[18]

§ 67. Duty to Avoid Accident.—One using a public street is charged with the duty of observing approaching vehicles. This rule is qualified and explained, however, by the equally general rule that, except in cases where the law itself fixes a standard of care, negligence is always relative and to be determined in view of all the circumstances of the particular case.[19] The driver of a vehicle should proceed carefully and be on the alert lest he collide with others.[20] It is the duty of the driver of a vehicle who is suddenly confronted with danger, though arising from the fault of another, to seek to avoid a collision. Whether he has taken the proper course depends upon all the circumstances of the case.[1] "Every person using the public streets and highways for the purposes for which they are established and maintained has the right to assume that other persons using such streets and highways for the same purpose will, when so using them, obey the law regulating their use by pedestrians and drivers of vehicles of any kind. But this is not to say that any person, whether pedestrian or the driver of a vehicle, when using such thoroughfares for the purposes they are intended for, is not also himself required to exercise due care for his own safety or to observe the duties with

17. Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595.

18. Woodhead v. Wilkinson, 181 Cal. 599, 10 A. L. R. 291, 185 Pac. 851. See supra, § 24, as to negligent destruction of automobile by employee at gasoline service station.

19. Regan v. Los Angeles Ice & Cold Storage Co., 31 Cal. App. Dec. 739, 189 Pac. 474. See NEGLIGENCE.

20. Lampton v. Davis Standard Bread Co., 32 Cal. App. Dec. 514, 191 Pac. 710; Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931.

1. Hagenah v. Bidwell, 31 Cal. App. Dec. 765, 189 Pac. 799.

which the law expressly charges him.'"[2] However, the duty of the driver of an automobile to avoid accident is not to be measured by the standard of what expert drivers could do with the type of automobile in question.[3] And one may, considering all the circumstances at a time of sudden peril, act even injudiciously without being held to strict accountability.[4] To charge one with culpable negligence who, having a clear opportunity to do so, fails to avoid an accident and consequent injury to another, it is only necessary to show that he failed to exercise ordinary care to prevent the accident. It is not necessary to show a deliberate purpose to injure.[5]

§ 68. Duty to Observe Roadway, Give Warning, etc.— An automobile driver whose view of the road in front of him through his windshield is obstructed is bound to stop at the side of the road, or place himself in a position where he can see the highway, and if looking around the side of the wind-shield is the only way he can get a proper view ahead, then he must do that, if he would be free from negligence.[6] A chauffeur, who backs his car, while on the wrong side of the street for travel in that direction, in an effort to bring it into parking space, and who fails to look in the direction the car is going, to see if anyone is in the immediate vicinity, is guilty of negligence. He is also negligent, it would seem, if he fails to give signal or warning of his backward motion. But he is not negligent in backing on the wrong side of the street in an effort to park merely because he could not see over the back of the automobile, if he took reasonable precautions by looking

2. Barton v. Studebaker Corp. of America, 31 Cal. App. Dec. 905, 189 Pac. 1025.

3. Meier v. Wagner, 27 Cal. App. 579, 150 Pac. 797.

4. Lawrence v. Goodwill, 30 Cal. App. Dec. 737, 186 Pac. 781. See infra, § 72, as to imminent peril excusing contributory negligence.

5. Lawrence v. Goodwill, 30 Cal. App. Dec. 737, 186 Pac. 781.

6. Woodhead v. Wilkinson, 181 Cal. 599, 10 A. L. R. 291, 185 Pac. 851. See infra, § 75, as to driving at night at a speed which prevents safe observation of highway.

backward to the right and left, or by standing up and looking over the back of the car.[7] Inasmuch as the driver of an automobile is required to observe the road along which he travels and attend to the operation of his machine, he is under no obligation to keep all parts of his vehicle under observation to prevent small boys from finding lodgment on it to their peril.[8] Nor is he under obligation to sound a horn or give an alarm announcing his approach toward a person discovered in the street, unless he can do so in time to make the warning of some avail.[9] It may be that the movement and noise of a motor vehicle are themselves sufficient to give warning of its approach. If so, no obligation rests on the driver to give further warning, and his failure to do so is not actionable negligence.[10]

§ 69. Rights and Duties in Towing Machine.—The owner of an automobile has a right to tow his machine on the street by a rope attached to another automobile, provided he exercises due care for the safety of others. Warning of the presence of the rope is not required to be given by the owner of the machines under all circumstances as a matter of law, but the question of the necessity of warning, as, for instance, to a pedestrian who trips over the rope, is one for the jury to decide, in view of all the circumstances of the particular case. The question of the owner's duty to give warning of the presence of the tow rope, being for the jury, as is also the question of the pedestrian's negligence in failing to observe the rope, it is error to instruct that the owner was bound to give

7. Sheldon v. James, 175 Cal. 474, 4 A. L. R. 1493, 166 Pac. 8.

8. Allred v. Pioneer Truck Co., 179 Cal. 315, 176 Pac. 455.

9. Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505.

10. Zechiel v. Los Angeles Gas & E. Corp., 31 Cal. App. Dec. 1049, 190 Pac. 720. See infra, § 69, as to warning when machine is being towed; and infra, § 104, as to giving warning to pedestrians approached from behind.

warning, and that the pedestrian was not bound by the presence of the rope unless she actually saw it.[11]

§ 70. **Negligence Per Se.**—One who operates an automobile in a manner which violates an express provision of a statute is guilty of negligence.[12] "It is well settled in this state that the violation of an ordinance is a breach of duty toward the person injured by such violation. It is presumptive evidence of negligence, which, if not excused by the circumstances shown, is sufficient proof of negligence to support an award of damages to the injured person in an action based on such charge of negligence."[13] Negligence per se, where it is the proximate cause of injury and when the plaintiff is free from contributory negligence, justifies a recovery.[14] And it is a general rule that a plaintiff's violation of an ordinance, which directly contributes to his injury caused by the negligence of another, bars his recovery. But this rule has no application to a case where such violation bears no causal relation, nor contributes, to the injury sustained.[15] It cannot be said that the operation of an automobile upon a highway in such a manner as to make a loud noise, or to create dust or smoke, constitutes negligence as a matter of law.[16]

§ 71. **Contributory Negligence in General.**—The law of California does not recognize degrees of negligence, at least in cases of personal injuries arising from the operation of vehicles. Any want on the part of the plaintiff of

11. Steinberger v. California Elective etc. Co., 176 Cal. 386, 168 Pac. 570.

12. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713. And see infra, § 75, as to violation of speed laws constituting negligence per se.

13. Harris v. Johnson, 174 Cal. 55, Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 Pac. 1155.

14. Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37. See infra, § 157, as to necessity of proving proximate cause.

15. Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109. See infra, § 71, as to contributory negligence in general. And see NEGLIGENCE.

16. Henderson v. Northam, 176 Cal. 493, 168 Pac. 1045.

the care which is appropriate to the circumstances is negligence, and, under the provisions of section 1714 of the Civil Code, will prevent a recovery if it be one of the proximate causes of injury.[17] The negligence of the parties cannot be compared.[18] Every person has a right to presume that every other person will obey the law, and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could arise only by the violation of law or duty by another.[19] But this does not relieve him of the duty of exercising due care on his own part;[20] nor allow him to willfully close his eyes to danger.[1]

The defense of contributory negligence is predicated as a matter of law upon defendant's own negligence.[2] But the defense is not open to one who is himself guilty of negligence so great as to be reckless, willful and wanton in its nature.[3] Nor has it any application to a case founded on the alleged willful act of a defendant in causing a collision between his automobile and that of the plaintiff.[4]

In passing upon the defense of contributory negligence the court must hold the scales of justice with even hand.

17. Konig, v. Lyon, 33 Cal. App. Dec. 67, 192 Pac. 875; Steinberger v. California Electric etc. Co., 176 Cal. 386, 168 Pac. 570. See NEGLIGENCE.

18. Konig v. Lyon, 33 Cal. App. Dec. 67, 192 Pac. 875.

19. Barton v. Studebaker Corp. of America, 31 Cal. App. Dec. 905, 189 Pac. 1025; Moreno v. Los Angeles Transfer Co., 30 Cal. App. Dec. 696, 186 Pac. 800; Commonwealth B. & C. Co. v. Pacific Electric Ry. Co., 29 Cal. App. Dec. 492, 184 Pac. 29; Harris v. Johnson, 174 Cal. 55, Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 Pac. 1155; Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078. See infra, §§ 109, 110, as to pedestrian's right to assume motorists will obey law; infra, § 150, that motorist has no right to rely on performance of duty by train crew of steam railroad.

20. Barton v. Studebaker Corp. of America, 31 Cal. App. 905, 189 Pac. 1025.

1. Commonwealth B. & C. Co. v. Pacific Electric Ry. Co., 29 Cal. App. Dec. 422, 184 Pac. 29.

2. Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234.

3. Moreno v. Los Angeles Transfer Co., 30 Cal. App. Dec. 696, 186 Pac. 800.

4. Tognazzini v. Freeman, 18 Cal. App. 468, 123 Pac. 540.

"The element of sympathy for the suffering, mental or physical, of the plaintiff can be given no weight if he took chances which the law declares can only be taken upon the responsibility of those who take them and so bring themselves and others into peril."[5]

§ 72. Imminent Peril Rule.—One suddenly confronted with an unexpected danger may use such means for avoiding it as would appeal to a person of ordinary prudence in a like situation without being held to strict accountability as to whether the course chosen is the most judicious or not.[6] And the fact that he errs in judgment, miscalculates the space in which he may move, or momentarily forgets and encounters another danger, does not necessarily warrant the conclusion of contributory negligence, because, afterward, it may appear that he might have avoided both perils by choosing a different course.[7] While it is often true that in cases of sudden circumstances of danger a person does the very act that he ought not to do to save himself from being injured, yet where the party causing those circumstances acted negligently and the injured person did not himself intentionally or from culpable carelessness contribute thereto, the latter

5. Griswold v. Pacific Electric Ry. Co., 30 Cal. App. Dec. 922, 187 Pac. 65. See supra, § 70, as to contributory negligence per se; infra, §§ 76–86, as to contributory negligence of passengers; infra, §§ 107–114, as to contributory negligence of pedestrians and persons in street; infra, § 116, as to contributory negligence of horseback rider; and infra, § 119, as to contributory negligence of bicycle rider.

6. McPhee v. Lavin, 60 Cal. Dec. 31, 191 Pac. 23; Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781; Hirst v. Morris & Co., 31 Cal. App. Dec. 105, 187 Pac. 770; Townsend v. Butterfield, 168 Cal. 564, 143 Pac. 760; Raymond v. Hill, 168 Cal. 473, 143 Pac. 743; Tousley v. Pacific Electric Ry. Co., 166 Cal. 457, 137 Pac. 31; Huff v. Los Angeles Pacific Co., 158 Cal. 596, 112 Pac. 53; Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358; Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94; Livinger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235. See 6 A. L. R., p. 680, as to "emergency rule" as applied to automobile drivers. And see generally, NEGLIGENCE.

7. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398.

will not be held responsible for any injury he may sustain merely because he did not act prudently or with good judgment in an effort to escape injury.[8] The rule that sudden peril may excuse imprudence is thus stated by Justice Hart:

"Common experience tells us that instances often occur in which appalling circumstances of imminent danger or peril so suddenly and unexpectedly confront persons of ordinarily cool and calm temperament and judgment that they for the time lose their presence of mind, or so find themselves in a position in which they are required to make up their minds as to the best or safest course to adopt to avoid the disaster which such circumstances threaten commensurately with the suddenness with which they arise. . . . The courts have uniformly held that, in such cases, in which damage or injury has directly resulted from the exercise of an erroneous judgment in attempting to meet or overcome the peril of such circumstances, the party whose act has thus caused the injury will not be held actionably responsible or liable for any injury or damage so caused."[9]

§ 73. Questions of Law and Fact.—There is no precise and unvarying measure by which to determine whether the driver of an automobile exercises ordinary care; the question is commonly one of fact;[10]

"The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence. In these days of rapid transit and congested traffic, every man who crosses a busy street, or drives an automobile, takes chances, and serious ones. The question is, are they greater than is reasonably necessary to meet the ordinary

8. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358; Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407.

9. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781. See supra, § 67, as to duty to avoid accident, though danger arises from another's fault; infra, §§ 108, 116, 127, for application of the rule.

10. Fisk v. Poplin, 31 Cal. App. Dec. 786, 189 Pac. 722; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38; Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078; King v. Green, 7 Cal. App. 473, 94 Pac. 777. See NEGLIGENCE.

requirements of business, or even pleasure? Where the precise facts under consideration are such as to give rise to an honest difference of opinion between intelligent men, the question is one for the jury."[11]

Even where there is no conflict in the evidence, negligence, whether of defendant or plaintiff, is a question of fact for the jury if different conclusions upon the matter can rationally be drawn from the evidence; but if only one conclusion can reasonably be reached, it becomes a question of law for the court.[12] This general rule applies to the operation of automobiles.[13] But the conflict necessary to make negligence or contributory negligence a question for the jury under the rule must be real and substantial.[14] And the court may withdraw the case from the jury and direct a verdict when the evidence is undisputed, or where it is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.[15]

§ 74. Effect of Speed Limitations in General.—The fixing of a speed limit by law is not a license to go ahead at that speed at all times and places. The rule has been thus discussed by Justice Lorigan:

"Whether a party is negligent or not is not determined solely by the fact whether at the rate of speed he was

11. Commonwealth B. & C. Ins. Co. v. Pac. Electric Ry. Co., 29 Cal. App. Dec. 492, 184 Pac. 29, per Sloane, J.

12. Firth v. Southern Pac. Co., 30 Cal. App Dec. 681, 186 Pac. 815; Moss v. H. R. Boynton Co., 30 Cal. App. Dec. 654, 186 Pac. 631; Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398; Murray v. Southern Pacific Co., 177 Cal. 1, 169 Pac. 675; Henderson v. Northam, 176 Cal. 493, 168 Pac. 1045; Walker v. Southern Pac. Co., 38 Cal. App. 377, 176 Pac. 175; Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358; Gousse v. Lowe, 41 Cal. App. 715, 183 Pac. 295; Whitney v. Northwestern Pac. R. Co., 39 Cal. App. 139, 178 Pac. 326.

13. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 Pac. 212; Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 Pac. 53. And see cases cited supra, this section.

14. Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34.

15. Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38.

making he was violating a city ordinance or not. If he was violating it, it was negligence per se, but he might not be violating it and still be negligent. The rule—speed limitation by ordinance or no speed limitation—is the general and well-established one applying to motor vehicles as to all other vehicles, and is that their operators must use all the care and caution in operating them which careful and prudent men should exercise having due regard for the safety of the public and the rights of others to the use of the streets. The operator of a vehicle may not escape liability for a collision by simply saying that he was not exceeding the speed limit established by statute or ordinance when it happened. It may appear (the other party being without fault) that though a defendant was not exceeding the limit of speed prescribed by the ordinance, yet that he was operating his vehicle without such control as to speed under the particular circumstances as a careful and prudent man in the exercise of due care and caution would have had."[16]

A legal requirement that drivers of vehicles shall drive in a careful manner and with due regard to the safety of others is a recognition of the rule that speed limits fix a maximum, but not a minimum, for careful driving.[17]

§ 75. Violation of Speed Laws as Negligence Per Se.—Driving an automobile at a rate of speed greater than that fixed by statute is of itself negligence.[18] Exceeding the speed limit is of itself actionable negligence if it causes injury, and it is not merely evidence of negligence to be

16. Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40. And see for analogous statements of the rule: Cook v. Miller, 175 Cal. 497, 166 Pac. 316; Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235 (applying the rule to a street-car).

17. Cook v. Miller, 175 Cal. 497, 166 Pac. 316.

18. Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40; Davis v. John Breuner Co., 167 Cal. 683, 140 Pac. 586; Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323; Scrogg v. Sallee, 24 Cal. App. 133, 140 Pac. 706; Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931; Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235 (applying rule to street-car). See supra, § 70, as to negligence per se in general; infra, § 134, as to speed at street intersections; and infra, § 157, as to necessity of proving proximate cause.

considered by the jury in connection with other evidence. While it is undoubtedly correct to say that such an act constitutes evidence of negligence, yet the rule in California is that it is conclusive evidence. Hence it is proper to characterize it in instructions as "of itself negligence," or "negligence as a matter of law," or "negligence per se," all of which are equivalent expressions.[19] While it is not true that driving an automobile at night at a speed which will not admit of stopping or avoiding an obstacle within the distance lighted by the machine's lamps is negligence per se, without reference to the degree of darkness of the night or the driver's knowledge of the road, the court declared itself not prepared to say that negligence might not be predicated as a matter of law, irrespective of any positive law as to speed limits, where an automobile is driven at night over a highway for knowledge of which the driver is dependent on the lights of his car, at a rate of speed which will not permit him to stop or to slow up sufficiently to avoid an obstacle within the distance covered by the lights.[20]

§ 76. Statutory Prohibition of Dangerous Speed.—The provision of section 22 of the Motor Vehicle Act, that " . . . no person shall operate or drive a motor or other vehicle on a public highway, at such a rate of speed as to endanger the life or limb of any person . . . ," the violation of which is a misdemeanor, forbids the driver of an automobile from endangering his own life or limbs, as well as those of others.[1] Evidence that a road ran through thickly settled territory, that the available roadway was but twenty-five feet in width, that there was constantly a heavy traffic of motor vehicles along the road, and that an automobile driver drove his machine along the road at a speed variously estimated at from twenty to twenty-

19. Scrogg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

20. Ham v. Los Angeles County, 59 Cal. Dec. 574, 189 Pac. 462.

1. Fidelity etc. Co. v. Industrial Acc. Com., 171 Cal. 728, L. R. A. 1916D, 903, 154 Pac. 834.

five miles an hour and conceded by the driver himself to have been in excess of eighteen miles an hour, creates a question for the jury as to whether the driver was violating the Motor Vehicle Act, as amended in 1907.[2]

Persons Chargeable.

§ 77. Liability in General.—Where the essence of the negligence which results in the collision of an automobile with a person or object is the speed and recklessness with which the machine is run, it is necessary, in order to fix defendant's liability therefor, that he should have been driving the car either personally or through his agent, or that he had the right to direct and control its movements.[3] Under the provision of section 2096 of the Civil Code, that "a carrier of persons without reward must use ordinary care and diligence for their safe carriage," the driver of an automobile in which he has a passenger as a guest owes to the latter a reasonable degree of care for his safety, and if injury results to the passenger proximately caused by the negligence of the driver, either sole or concurrent with that of another, the driver is liable to the passenger, in the absence of the latter's contributory negligence.[4] One injured by a collision between two automobiles is entitled to recover against one owner if such owner's negligence contributed to the accident, whether the owner of the other machine was also negligent or not, and without regard to the character or degree of his negligence.[5] But only the driver who was negligent

2. Weaver v. Carter, 28 Cal. 241, 152 Pac. 323. The Motor Vehicle Act (Stats. 1907, pp. 915, 916) provided that "no person shall operate a motor vehicle in a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person."

3. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358. See infra, § 90, as to liability of husband or parent as such.

4. Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 Pac. 319.

5. Blackwell v. American Film Co., 32 Cal. App. Dec. 937, 192 Pac. 189.

would be liable, and not both, unless both were negligent.[6] The fact that an electric light company is not authorized by its articles of incorporation to repair automobiles will not relieve it from liability for the negligent injury of a traveler by one of its employees who, in obedience to the order of his official superior, was engaged in towing with the company's truck an automobile to its repair-shop to have it repaired. Whether the contract for the repairs was within the company's powers is immaterial, the rule being that the defense of ultra vires is not available against liability for a tort.[7]

§ 78. Injuries by or to Infants.—Under the provision of section 41 of the Civil Code that "a minor . . . is civilly liable for a wrong done by him," a minor who occasions injuries to the property of another by his negligent operation of an automobile is personally liable therefor.[8] One driving a vehicle in proximity to school grounds, and at an hour when children may, with certainty, be expected to be using the street, is charged with a greater degree of caution than he would be required to use under ordinary circumstances, for what may be ordinary negligence toward an adult may be gross negligence with respect to a child.[9]

Contributory negligence.—An infant may be so very young that, like an idiot or lunatic, no negligence may legally be imputed to him. But not all infants are in that class. The rule is that the defense of contributory negligence may be invoked in actions by or on behalf of children who are of an age sufficient to exercise discretion for

6. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 613.

7. Chamberlain v. California Edison Co., 167 Cal. 500, 140 Pac. 25. See MASTER AND SERVANT, as to liability for injury occasioned by the corporation's agents or servants.

8. House v. Fry, 30 Cal. App. 157, 157 Pac. 500. See 1 A. L. R., p. 1385, as to liability for injury to child playing on or in proximity to automobile. See INFANTS.

9. Lampton v. Davis Standard Bread Co., 32 Cal. App. Dec. 514, 191 Pac. 710.

the avoidance of injury to themselves. The law does not fix this age of discretion. It may depend upon the character of the injury, the circumstances under which it occurred, and the size, intelligence and capacity of the child. The child is required to exercise the same degree of care, no more and no less, that would be expected from a child of his age, or which children of his years ordinarily exercise under like circumstances, taking into consideration not only age, but capacity for understanding. Hence, in an action for injuries to a boy of nine from a collision with an automobile, his age is to be viewed as a mere probative fact, bearing on the ultimate issue of contributory negligence, but not as raising a distinct issue as to his capacity for negligence.[10] A young child who runs across a street instead of walking, and, while looking in the wrong direction, is struck by an automobile, is not guilty of contributory negligence as a matter of law; the question is one for the jury.[11] It may well be questioned whether a child four and a half years of age should not be held non sui juris as a matter of law, and incapable of negligence contributing to his injury by an auto truck backing along the street.[12] But a parent who allows his infant child to use a bicycle on the public sidewalk in violation of a city ordinance is guilty of negligence precluding his own recovery for the death of the child caused by a motor truck while emerging from an alley on to the sidewalk.[13]

§ 79. Passengers in General—Imputed Negligence.—Any negligence by the driver of an automobile in operating the machine cannot be imputed to his guest on the ride, who has no control over him, nor supervision or direction as to the manner in which the automobile

10. Todd v. Orcutt, 29 Cal. App. Dec. 572, 575, 183 Pac. 963.

11. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223.

12. Zechiel v. Los Angeles Gas & E. Co., 60 Cal. Dec. 356, 192 Pac. 720.

13. Muller v. Standard Oil Co., 180 Cal. 260, 180 Pac. 605.

should be operated.[14] And this rule applies to passengers in automobiles operated as public conveyances for hire.[15] Applying the rule above stated, it has been held that the negligence of the driver of an auto truck in so parking his machine that the front end of it extends into the street an improper distance from the curb, in violation of a city ordinance, will not be imputed to one whom he has invited to ride with him and who is struck by a passing automobile as he is about to climb to the front seat of the truck; and this is held true, because he had not yet become a passenger in fact at the time of injury, as well as under the general rule.[16]

§ 80. Selection of Driver.—The mere selection of one as a driver of a motor vehicle, or the election to ride with him, will not of itself render the passenger responsible for the driver's negligence. Nor is it negligence for a passenger to ride with a driver though knowing him to be habitually careless. But it is the duty of the passenger in such a case to consider the driver's habitual carelessness in determining what precautions to take for his

14. Stewart v. San Joaquin L. & P. Co., 30 Cal. App. Dec. 460, 186 Pac. 160; Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 Pac. 319; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 Pac. 1059; Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 Pac. 385; Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460; Lynn v. Goodwin, 170 Cal. 112, L. R. A. 1915E, 588, 148 Pac. 927; Tousley v. Pacific Electric Ry. Co., 166 Cal. 457, 137 Pac. 31; Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709; Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407; Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235; Southern Pac. Co. v. Wright, 248 Fed. 261 (case arising in California). See supra, § 77, as to liability of driver to passenger; infra, § 157, as to driver's negligence precluding recovery against third person.

15. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709; Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407. See note, 4 A. L. R., p. 1499, as to duty and liability of carrier of passengers for hire by automobile. See, also, CARRIERS.

16. Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 Pac. 1059.

own safety, the question being whether, under all the circumstances, including the knowledge of the driver's character, the passenger has exercised ordinary care at the time of accident. The mere fact that a passenger has ridden with a driver many times without accident is, it seems, insufficient to charge him with knowledge of the driver's careless habit.[17] But while the mere selection of a driver, even of a careless driver, is not negligence, and while it is true that, in general, the negligence of the driver is not imputable to a passenger, yet the conduct of a passenger in an automobile in riding and continuing to ride in the machine when he must have known that the driver was intoxicated, establishes independent negligence on the passenger's part which bars his recovery for injuries sustained in an accident due primarily to the driver's negligence.[18]

§ 81. Control Over Driver—General Rule.—The rule that the negligence of the driver of an automobile will not be imputed to a passenger so as to bar the latter's recovery does not apply where the passenger exercises control over the driver, or, in the eyes of the law, may be said to possess such power of control. But while it is true that where two persons are engaged in a joint enterprise in the use of an automobile, the contributory negligence of one will bar a recovery by either, if it is a matter within the scope of the joint undertaking, yet in order that there be such a joint undertaking, it is not sufficient merely that the passenger or occupant of the machine may indicate to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise of riding together. The circumstances must be such as to show that the occupant and the driver

17. Wiley v. Young, 178 Cal. 681, 174 Pac. 316.

18. Lynn v. Goodwin, 170 Cal. 112, L. R. A. 1915E, 588, 148 Pac. 927. See note 8 A. L. R., p. 484, as to liability for negligence of chauffeur furnished with a car hired for an extended period.

together had such control and direction over the automobile as to place them practically in the joint or common possession of it. The doctrine of imputable negligence is too loosely applied to cases where the parties concerned are merely engaged in the performance of plans which all have agreed upon and which are as personal to one as to another, but where the essential element of control over details is lacking. The better view is that there can be no such thing as imputable negligence except in those cases where such a relation exists as that of master and servant or principal and agent; for in order that the negligence of one person may be properly imputed to another, they must stand in such a relation of privity that the maxim, qui facit per alium facit per se, directly applies. Indeed, no other rule is consistent with the provision of section 1714 of the Civil Code, wherein it is declared that everyone is responsible for an injury occasioned to another by his want of ordinary care except so far as the latter has, willfully or by want of ordinary care "brought the injury upon himself."[19]

§ 82. **Specific Instances.**—The mere fact that the driver is the passenger's son, or that both are officers in a corporation to which the automobile belongs, is not sufficient to occasion the imputation of the driver's negligence to the passenger. Family relation or business association does not identify the passenger with the driver for this purpose.[20] And where a son was driving his father as a passenger in an automobile owned by a corporation of which the father was president and the son secretary and manager, the son being an adult and experienced driver,

19. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 Pac. 385, per Lawlor, J.

See Gates v. Pendleton, 61 Cal. Dec. 165, 197 Pac. 664 (where it was held that the evidence was sufficient to show that the driver was under the direction and in the service of one of the defendants, who with others was riding in the automobile at the time of the accident).

20. See infra, § 90, as to family relation affecting liability.

and the trip being to the family home with a detour on corporate business, it is a question for the jury whether the father exercised or had the right to exercise such control over the son's operation of the machine as to make the latter's negligence imputable to him.[1] One who hires an auto truck on condition, imposed by the owner, that it shall be driven by a certain chauffeur, and who is injured in a collision between the truck and a railroad train while riding by the side of the chauffeur, is a passenger merely, and the negligence of the chauffeur is not imputable to him.[2] So a ranch superintendent whose employer has hired a motor truck and driver for use on the ranch, who is riding as a passenger on the truck at the time of accident, but is not exercising control nor giving direction as to its movements, the driver acting solely on his own initiative and at his discretion in its operation, is not liable for the latter's negligence.[3] The negligence of the operator of a steam roller in failing to avoid a collision with a motor truck, cannot be imputed to his helper, who is riding on the roller, but has nothing to do with its actual operation and no control over its operator, as to preclude the helper's recovery for injuries, there being nothing that could be construed as a joint enterprise between them.[4] Information given to a taxicab driver by a passenger desiring to visit a certain hospital, that it is "out H street," does not amount to a direction to the driver, who is familiar with the streets, to traverse the street named, and, more especially, it does not amount to a direction to return by that route when its grades are rendered unsafe by rain, and other routes, known to the driver, are available.[5]

1. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 Pac. 385.

2. Southern Pac. Co. v. Wright, 248 Fed. 261.

3. Burns v. Southern Pac. Co., 30 Cal. App. Dec. 262, 185 Pac. 875.

4. Moreno v. Los Angeles Transfer Co., 30 Cal. App. Dec. 696, 186 Pac. 800.

5. Hathaway v. Coleman, 35 Cal. App. 107, 169 Pac. 414.

§ 83. Reliance on and Interference With Driver in General.—A passenger in an automobile operated as a public conveyance has the right at all times to trust to the driver to avoid the ordinary dangers of the road, with which the driver is familiar.[6] Until he has some reason to suspect that the driver is incompetent or careless, or unable safely to operate the motor vehicle, the passenger not only has the right, but it is his duty, to assume that the driver will not rashly or carelessly go into peril. Generally, it is the duty of a passenger to sit still and say nothing. It is his duty, because any other course is fraught with danger. Interference, by laying hold of an operating lever, or by exclamation, or even by direction or inquiry, is generally to be deprecated. In general, the greater safety lies in letting the driver alone.[7] However, a passenger or guest is not absolved from the duty of using ordinary care for his own safety.[8] Under this rule, where one continues as a passenger in an automobile which is being driven at night over an unknown, wet and slippery road, without lights, and at a speed of eighteen or twenty miles an hour, a jury may properly find him negligent on his own part in not requesting the driver to lessen his speed, or to stop and permit him to leave the car.[9]

§ 84. On Approaching Railway Tracks.—A passenger in a motor vehicle approaching a railway crossing is under no legal obligation to warn the driver, either of the presence of the tracks or of an approaching train, the view being unobstructed and the driver reasonably competent and vigilant.[10] And while it is the passenger's duty to look and listen, it is not his duty to stop for a successful observation, since he has no authority over the driver, but

6. Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407.

7. Southern Pac. Co. v. Wright, 248 Fed. 261.

8. See infra, § 85.

9. Stewart v. San Joaquin L. & P. Co., 30 Cal. App. Dec. 460, 186 Pac. 160.

10. Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407; Southern Pac. Co. v. Wright, 248 Fed. 261.

is wholly subject to the latter's action.[11] The passenger has a right to suppose that the driver, on approaching a railway crossing with which he is familiar, will exercise due care for the protection and safety of his passengers, and that, even when so near the crossing as to be in apparent danger of collision with an oncoming train, he will or may take some action which will avert an accident.[12] Nor is the passenger obliged, even when the danger of collision becomes suddenly imminent, to displace the driver, seize the operating levers, and endeavor to avoid the impending catastrophe.[13] Nevertheless, it has been said that the passenger must look out for himself, and may not, in a place of danger as on approaching a railway crossing, rely blindly on the driver.[14] But a passenger in a machine operated by another, cannot be said as a matter of law to have been negligent in not calling the chauffeur's attention to the danger of a collision.[14a]

§ 85. Passenger's Duty to Safeguard Himself in General.—The doctrine that the driver's negligence will not be imputed to the passenger does not absolve the passenger from exercising ordinary care for his own safety.[15] And if he is aware that the operator of the car is carelessly rushing into danger, it may be incumbent upon him

11. Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030; Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407.

12. Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407.

13. Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030.

14. Commonwealth B. & C. Co. v. Pacific Electric Ry. Co., 29 Cal. App. Dec. 492, 184 Pac. 29.

14a. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709. See infra, § 86, as to care required of passenger in general at railway crossing.

15. Commonwealth B. & C. Co. v. Pac. Electric Ry. Co., 29 Cal. App. Dec. 492, 184 Pac. 29; Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460; Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709; Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407; Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405; McClure v. Southern Pac. Co., 41 Cal. App. 652, 183 Pac. 248.

to take proper steps for his own protection.[16] But while this is a duty, it is error, nevertheless, in an action by him in which the plea of contributory negligence is interposed, for the court to take from the jury the issue of his own negligence.[17] And contributory negligence in such cases cannot be predicated upon an omission to assume that another will violate the law.[18]

§ 86. At Railway Crossings.—While it is the duty of a passenger in an automobile, on approaching a railway crossing, to look and listen and use all his faculties to the end that he may exercise the requisite degree of care to protect himself from injury,[19] the amount of diligence required of the passenger, who is not controlling or directing the operation of the machine, and that imposed on the driver, differ materially. Hence, the fact that the driver might be guilty of negligence as a matter of law in not observing an oncoming locomotive in time to avoid a collision would not necessarily imply such negligence on the part of the passenger.[20] The passenger is not obliged, when the danger of a collision becomes suddenly imminent, to think quickly enough to enable him to leap from the automobile in time to save himself.[1] And in a case where, on being confronted with a sudden peril of colli-

16. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709.

17. Ilardi v. Central Cal. Traction Co., 36 Cal. App. 488, 172 Pac. 763 (a horse-drawn vehicle case); Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 Pac. 319; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 Pac. 1059; Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460; Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405.

18. Moreno v. Los Angeles Transfer Co., 30 Cal. App. Dec. 696, 186 Pac. 800 (one riding on a vehicle is not required, either under the common law or under any statute of California, to refrain from occupying a position that could become a place of danger only by reason of the negligence of the operator of another vehicle).

19. Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407.

20. Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405.

1. Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030.

sion with an electric railway train, he leaps to a position of supposed or comparative safety, the jury has a right to believe that his act was intended to shield him from injury, and that he was in fact in the exercise of due care for his own safety at the moment of collision.[2] So, too, he cannot be said to be guilty of contributory negligence because, though he might have effected his own escape, he was injured while endeavoring to save the life of another passenger, and in this was not acting with a recklessness unwarranted by the judgment of an ordinarily prudent man.[3] In a case where the passenger in an automobile was not aware of the approach of an electric street railway car until a collision actually occurred, and could recall nothing of the immediate circumstances of the accident, he was said not to be guilty of contributory negligence.[4]

§ 87. Doctrine of Respondeat Superior in General.—The doctrine of respondeat superior is based upon such a relationship as gives one the legal right to direct the activities of the other and imposes on the latter the legal duty of submitting to such direction. Hence, the doctrine does not apply to the case of the driver of an automobile who, at the request or with the consent of a friend, has gone on an errand for the latter, but is at liberty to proceed with its performance in any way he chooses, and would be guilty of no breach of legal duty if he failed to perform it altogether. In such case there is no relationship of master and servant, principal and agent, or employer and employee, and the friend cannot be held chargeable with the negligence of the driver in the operation of the machine, while engaged in the discharge of the errand.[5]

2. Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 174 Pac. 407.

3. McClure v. Southern Pac. Co., 41 Cal. App. 652, 183 Pac. 248.

4. Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235. See supra, § 84, as to reliance on driver at railway crossing.

5. Stoddard v. Fiske, 35 Cal. App. 607, 170 Pac. 663. See MASTER AND SERVANT.

Under the doctrine, it is the negligence of the subordinate imputed to his superior that forms the basis of liability, and not the personal negligence of the superior himself. Thus, an employer is liable for his chauffeur's actual negligence at the time of an accident, apart from any consideration of the chauffeur's general character or qualifications.[6]

§ 88. Responsibility of Owner in General.—The weight of authority undoubtedly supports the proposition that the bare fact of ownership of an automobile does not impose liability for its negligent operation by another, in the absence of any relation of principal and agent, or analogous relation, between owner and driver.[7] And no such inculpatory relation arises from the mere borrowing of the automobile by the driver for his own purposes.[8] Nor is the relation of lender and borrower altered or enhanced by the fact that the borrower of the automobile is also an employee of the lender, having duties assigned him in another locality;[9] nor by the fact that the borrower has not only hired the machine, but has also the services of the owner's chauffeur to run it, both machine and chauffeur being under the borrower's direction and control.[10] So the provision of section 19 of the Vehicle Act, that "no person shall allow a motor vehicle owned by him or under his control to be operated . . . in violation of the provisions of this act," does not operate to alter the rule that a relation of principal and agent, or some similar connection, must exist between owner and driver in

6. Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35. See MASTER AND SERVANT.

7. Martinelli v. Bond, 29 Cal. App. Dec. 240, 183 Pac. 463; Brown v. Chevrolet Motor Co. of Cal., 39 Cal. App. 738, 179 Pac. 697.

8. Hall v. Puente Oil Co., 32 Cal. App. Dec. 306, 191 Pac. 39; Burns v. Southern Pac. Co., 30 Cal. App. Dec. 262, 185 Pac. 875; Brown v. Chevrolet Motor Co. of Cal., 39 Cal. App. 738, 179 Pac. 697.

9. Brown v. Chevrolet Motor Co. of Cal., 39 Cal. App. 738, 179 Pac. 697.

10. Burns v. Southern Pac. Co., 30 Cal. App. Dec. 262, 185 Pac. 875.

order to charge the former for the latter's infractions of the statute. The fact that the owner has registered the machine as required by the act and procured a license for it, is immaterial, the argument that where the public has given a licensee the privilege of using the public highways, he is liable for any injury resulting from the omission of any statutory duty imposed as a condition of enjoying the privilege, not being persuasive, in view of the language of the statute which distinguishes between owners and persons in control, and which by the use of the word "allow," implies knowledge of the infraction. Thus, the failure of an independent contractor, who is operating the machine under a conditional sale contract, to keep a tail-light burning as required by the statute, cannot be imputed to the owner thereof so as to render him liable for a resulting accident.[11] In view of these authorities, the general statement found in one case that the owner owes a duty to the public to see that his car, when driven with his permission, is carefully operated, and that he cannot escape responsibility on the ground that the use thus authorized by him is permissive only, must be interpreted in the light of the particular circumstances then under consideration by the court.[12]

§ 89. Retention of Control by Owner.—But the owner's relation to the operation of the machine is, of course, altered when he retains any measure of control over it. "If the owner of an automobile lends his machine to another and on invitation becomes a passenger therein, in the absence of any agreement to the contrary, the owner has the right, and, indeed, it is his duty to prevent, if possible, the driver from operating the machine in a reckless and dangerous manner and in violation of law. He cannot sit idly by and refrain from remonstrance, at least,

11. Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 Pac. 168.

12. Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595. See infra, § 90, as to effect of parental relation on owner's liability.

while knowing that the driver is thus endangering the lives of others. If he has the opportunity to restrain the driver and fails to take advantage of it, he should be held responsible for the consequences." Accordingly, the owner of an automobile who loans it to another to drive and becomes a passenger with him is liable for the death of a pedestrian struck while the machine was traveling forty miles an hour, and when it came upon the victim from behind without effective warning, though both occupants must have seen him in time to have brought the car under control and avoided the accident.[13] In an action by a spectator at a road race who was injured by the alleged negligence of a driver of one of the automobiles, it is not necessary to show that the automobile sales company which he sued was the absolute owner of the car. It is sufficient to charge it, if otherwise liable, to show that it was in possession and control of the car and had it entered for the race.[14]

§ 90. **Effect of Family Relation.**—Under the statutory provision (Civil Code, § 171a) that a husband is not liable for his wife's torts except in cases where he would be jointly liable with her if the marriage did not exist, the mere relationship of husband and wife will not charge the husband with responsibility for the negligence of his wife in operating an automobile. If he keeps an automobile for the use of his wife, she will be regarded as his agent in its operation, on the theory that it is as much his duty to furnish her, within his means, with the instrumentalities of pleasure and recreation, as with food and clothing.

13. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358, per Burnett, J.

14. Johnson v. Reliance Automobile Co., 23 Cal. App. 222, 137 Pac. 603. See 2 A. L. R., p. 888, as to owner's presence in automobile operated by another as affecting former's liability; 2 A. L. R. p. 900, as to liability of parent for injury to child's guest by negligent operation of car; and see 4 A. L. R., p. 361, as to validity, construction and effect of statutes which make owner responsible, or create a lien, for injury or damage inflicted by another operating an automobile.

Where, however, the automobile is not kept especially for the wife's use, but at the time of accident she is operating it with the husband's express consent and permission, a presumption arises that the wife is, in the matter, the husband's agent, and the burden is on him to rebut this presumption.[15]

While the mere fact of parentage alone will not render a parent liable for the torts of his minor child which are unauthorized and unratified by him, and liability, if any, must rest on a showing of agency and the doctrine of respondeat superior, yet a parent who purchases an automobile for the use, pleasure and enjoyment of his family, including his minor son, and who permits and authorizes the son to drive the car, is liable for the son's act in driving it so recklessly as to injure another. In such case the parent's act in allowing his reckless son to operate the car is deemed to be the real cause of the injury. This principle is recognized in that provision of section 19 of the Vehicle Act that no person shall allow a motor vehicle owned by him or under his control to be operated by any person who has no legal right to do so, or in violation of the provisions of the act.[16] And under this clause of the act, a father who by an implied consent allows his son to operate his automobile when the son has no license as an operator as the Vehicle Act requires is liable for the son's negligence.[17]

§ 91. Presumption of Liability from Proof of Ownership.—Proof of the ownership of an automobile creates a

15. McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417. See infra, §§ 91, 92, as to presumption of liability arising from proof of ownership. See note, 5 A. L. R., p. 226, as to liability of owner under "family-purpose" doctrine, for injuries by automobile while being used by member of his family. And see, generally, HUSBAND AND WIFE.

16. Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595. See, generally, PARENT AND CHILD.

17. Walsh v. Flatland, 36 Cal. App. 819, 173 Pac. 596. See supra, § 82, as to family relation affecting imputation of driver's negligence to passenger.

presumption that the person driving it at the time of an accident was the owner's agent.[18] This presumption establishes a prima facie case which, in the absence of countervailing evidence, will sustain a finding of the owner's responsibility.[19] The burden of proof is upon the owner to rebut this presumption, because the question of agency or employment of the driver is a fact peculiarly within the knowledge of the owner of the car—oftentimes unknown to the injured party, while the owner is presumed to possess evidence of the truth.[20] Evidence that the driver had taken the machine out to have it repaired at the request of the owner's son, but that neither had the owner's authority or consent to do so, will, if believed by the court, rebut the presumption. But the court is not bound to believe such evidence, especially when some of the statements of the witnesses are contradictory.[1]

§ 92. Effect of Proof to Overcome Presumption.—Two contradictory views have been taken by the courts of appeal as to the effect of the presumption of liability arising from proof of ownership. On the one hand, it is said that the presumption continues to function as evidence even after testimony to the contrary has been introduced by the defendant, and the jury may, if such testimony does not carry conviction to their minds, disregard it and base their finding on the presumption alone. This view is based on that provision contained in subdivision 2 of section 2061 of the Code of Civil Procedure which directs that juries shall be instructed that they are not bound to

18. Dierks v. Newson, 33 Cal. App. Dec. 482, 194 Pac. 518; Martinelli v. Bond, 29 Cal. App. Dec. 240, 183 Pac. 463; Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358; Maupin v. Solomon, 41 Cal. App. 323, 183 Pac. 198; Grantham v. Ordway, 40 Cal. App. 758, 182 Pac. 73; Brown v. Chevrolet Motor Co. of Cal., 39 Cal. App. 738, 179 Pac. 697; McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417.

19. Dierks v. Newson, 33 Cal. App. Dec. 482, 194 Pac. 518; McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417.

20. McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417.

1. Dierks v. Newsom, 33 Cal. App. Dec. 482, 194 Pac. 518.

decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number or "against a presumption."[2] In this view, testimony of the driver, an employee of the owner, that on the occasion of the accident he was using the machine in the prosecution of his own private affairs, merely creates a conflict with the presumption which it is for the jury to resolve.[3]

The other view is the direct opposite of this. It is that the presumption exists only so long as there is no evidence to disclose the actual truth, but that uncontradicted proof that no agency in fact existed, overcomes and dissipates the presumption, so that it is no longer available either to create a conflict in the evidence or to afford the basis of a finding.[4] Thus, uncontroverted testimony that the driver, an employee of the owner, was using the machine for his own pleasure at the time of the accident dispels the presumption.[5] The supreme court has not expressly taken sides in this conflict of authority, except to point out that the so-called "presumption" in question is in fact but an "inference" within the statutory definition that "an inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect," and is not a presumption declared by law. Hence, it has been said, positive evidence that the employee was at the time using the machine for his own personal recreation, introduced on the part of the defense, simply negatives an inference, and does not overcome a legal presumption.[6]

2. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358; Grantham v. Ordway, 40 Cal. App. 758, 182 Pac. 73. As to effect of presumptions generally, see EVIDENCE.

3. Grantham v. Ordway, 40 Cal. App. 758, 182 Pac. 73.

4. Martinelli v. Bond, 29 Cal. App. Dec. 240, 183 Pac. 463; Maupin v. Solomon, 41 Cal. App. 323, 183 Pac. 198; Brown Chevrolet Motor Co. of Cal., 39 Cal. App. 738, 179 Pac. 697.

5. Martinelli v. Bond, 29 Cal. App. Dec. 240, 183 Pac. 463; Maupin v. Solomon, 41 Cal. App. 323, 183 Pac. 198.

6. Maupin v. Solomon, 41 Cal. App. 326, 183 Pac. 198 (denying

§ 93. Responsibility of Employers in General.—Before the responsibility of the master can arise, the relation of master and servant must exist, and the determination of its existence occasionally involves nice questions of law and fact. Thus it has been held that a school of automobile instruction is liable for injuries occasioned the occupant of a buggy in collision with one of its automobiles being driven by one of the school's students, who was intrusted with the wheel by an instructor, who accompanied him and was giving him a lesson in driving, and whose incompetence occasioned the accident.[7] And the driver of a truck for an electric lighting corporation who, in obedience to the orders of his official superior, took the truck to the home of another employee who owned an automobile, and towed the automobile to the company's repair-shop, where it was repaired, and charges therefor were collected by the company, was held to have acted for the company and not for the owner of the automobile, and hence that in such case, a company is liable for his negligent injury of another person while towing the automobile.[8] But an automobile sales company is not bound by the act of its secretary-treasurer in personally entering an automobile, for the sale of which it has not yet become agent, in a road race, though he enters it, without the company's knowledge, in the company's name; nor by his further act in hiring a driver, through whose alleged negligence a spectator was injured.[9]

§ 94. Independent Contractors.—Under the definition of "servant" as given in section 2009 of the Civil Code,

a rehearing of Maupin v. Solomon, 41 Cal. App. 323, 183 Pac. 198).

7. Easton v. United Trade School Con. Co., 173 Cal. 199, L. R. A. 1917A, 394, 159 Pac. 597.

8. Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 Pac. 25. See infra, § 176, as to effect of finding freeing servant of charge of negligence, on liability of employer.

9. Johnson v. Reliance Automobile Co., 23 Cal. App. 222, 137 Pac. 603.

and under the test whether the master has authoritative control over the servant, with respect to the manner in which the details of the work are to be performed, an automobile salesman who works on commission only, having entire control of his methods and hours, and who does not conclude sales but merely presents the prospective purchaser to the company, is an independent contractor and not a servant, and the automobile company is not liable for an accident occurring through his negligent management of his automobile, in which a prospective purchaser who was riding with him as a passenger was injured. Nor does the doctrine of ostensible agency apply, as that doctrine is founded on the principle of estoppel and there is nothing in such a case to create an estoppel against the company. The doctrine of ostensible agency is rarely applied in cases of tort.[10] The owner of an automobile who turns it over to a mechanic to put in order, and who exercises no control over the work nor over the mechanic in its performance, is not liable to a third person for an injury caused by the negligence by the mechanic who had taken the machine out on the street to test it, though in doing so the mechanic was engaged in the due performance of the work. The mechanic's status is that of an independent contractor, who alone is responsible for his negligence.[11] And the seller of a motor truck under a conditional sale contract which requires the purchaser to keep it in repair is not liable for the negligent operation of the truck by servants of the purchaser while bringing it from a repair-shop, though at other times the truck may be used by the purchaser in the discharge of a further contract of employment with the seller.[12]

10. Barton v. Studebaker Corp. of America, 31 Cal. App. Dec. 905, 189 Pac. 1025. See, generally, as to ostensible agency, AGENCY, vol. 1, p. 737.

11. Segler v. Callister, 167 Cal. 377, 51 L. R. A. (N. S.) 772, 139 Pac. 819.

12. Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 Pac. 178.

§ 95. General Rule as to Scope of Employment.—As applied to the relation of master and servant, the doctrine of respondeat superior rests upon the proposition that in doing the acts out of which the charge of negligence arises the servant was representing his master at the time, and engaged in his business. Unless the servant was engaged in performing a service for the master, or in some act incidental thereto, the doctrine cannot be invoked.[13] The same general idea is expressed in the provision of the Civil Code.[14] Or, to express the same principle in another form of words, the test of an employer's liability for the tortious act of his employee when the latter is driving his automobile, is whether it was then being used in the transaction of the employer's business. The very basis of the rule of respondeat superior, as applied to automobile accidents, is that the driver is acting for the owner, and not for himself personally, at the time of the accident. As soon as the driver steps aside from the owner's business and enters upon the performance of some independent purpose of his own, he ceases to act as the agent of the owner, and the latter's responsibility for his acts terminates. Neither the fact of ownership of the automobile by the employer nor the fact that its use and care were intrusted entirely to the employee renders the employer liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with the employer or his business.[15] But the fact that the particular act or service in which the employee is engaged at the time of accident, though undertaken in behalf of his employer, is not within the general scope of his employment, will not exculpate the employer. Thus the fact that the secretary of a company, after finishing his day's work, at the request of the bookkeeper takes a check to a neighboring

13. Hall v. Puente Oil Co., 32 Cal. App. Dec. 306, 191 Pac. 39.

14. Civ. Code, § 2338. See MASTER AND SERVANT.

15. Martinelli v. Bond, 29 Cal. App. Dec. 240, 183 Pac. 463.

place to have it properly signed, though such service on his part is no part of his customary duties, was held not to relieve the company from liability for an accident occurring after that act was fully completed and the employee was on his way home.[16]

§ 96. Disobedience of Instructions.—Mere disobedience of specific instructions by an employee, while carrying out the general business of the employer, even though such instructions have to do with the use of the automobile, will not relieve the employer of liability. Thus, though a father has instructed his son, who acts as his chauffeur, to remain at home until he telephones for him to come for him, he is nevertheless liable as a principal for injuries occasioned by the son's negligent operation of the automobile while, in disregard of the father's instructions, he is traveling from the house in order to reach a telephone and communicate with the father to ascertain his whereabouts and bring him home. The son, in such case, is deemed to act within the general scope of his authority, though in disregard of directions at the moment.[17] Evidence that an owner instructed his chauffeur, on the eve of a holiday, to leave the machine in the garage and spend the holiday as he pleased, that the owner's general instructions were that in no case was the chauffeur to use the car himself, but was to return it always to the garage and give the key to a superior servant, and that he was always to take the car out by a certain entrance under the eye of the servant, and that on this holiday the chauffeur took the car out to wash it, injured it, and then drove it through a forbidden exit, into the streets to have it repaired, where he collided with a pedestrian, has been held to present a case where the question of the owner's responsibility is one for the

16. Brimberry v. Dudfield Lumber Co., 60 Cal. Dec. 150, 191 Pac. 894 (Justice Shaw, in dissenting from the decision in this case, says that "it appears to be contrary to all authority"). See, also, infra, § 98.

17. House v. Fry, 30 Cal. App. 157, 157 Pac. 500.

jury to decide.[18] But under section 2338 of the Civil Code, defining a principal's liability for the negligence of his agent, it has been held that an employer who furnishes his employee with an automobile to use in the former's business, with instructions to keep it in the garage when not so in use, is not liable for a collision occurring when the employee, in violation of such instructions, was using the machine at night on a pleasure trip of his own. The controlling consideration here, however, may well have been the fact that the trip itself was unconnected with the employer's business.[19]

§ 97. Use of Automobile for Employee's Own Purposes. It is a well-settled rule that an employer who furnishes his employee with an automobile for use in his employment, even though he is also permitted to use it for his own purposes, is not liable for its negligent operation by the employee when he is thus using it to serve his own ends.[20] In such case, the employer is merely a lender of the machine.[1] If the servant takes his master's machine for a junketing or business trip of his own, the trip is not complete when he reaches a point miles away from where the machine ought to be. The servant is on his own trip until his return to the point of departure, or to a point where, in the performance of his duty, he should be. Thus, where a chauffeur, who was under strict orders not to use his employer's machine for purposes of his own, but who,

18. Adams v. Wiesendanger, 27 Cal. App. 590, 150 Pac. 1016.

19. Mullia v. Ye Planry Bldg. Co., 32 Cal. App. 6, 161 Pac. 1008; Maupin v. Solomon, 41 Cal. App. 323, 183 Pac. 198. See infra, § 97.

20. Hall v. Puente Oil Co., 32 Cal. App. Dec. 306, 191 Pac. 39; Martinelli v. Bond, 29 Cal. App. Dec. 240, 183 Pac. 463; Brown v. Chevrolet Motor Co. of Cal., 39 Cal. App. 738, 179 Pac. 697. See infra, § 98.

1. Hall v. Puente Oil Co., 32 Cal. App. Dec. 306, 191 Pac. 39. See supra, § 88, as to liability of lender of machine; supra, § 96, as to liability of employer, where employee uses machine for his own purposes in violation of instructions; and supra, § 92, as to effect of employee's testimony that he was using machine in his private affairs, as rebutting presumption of owner's liability arising from proof of ownership.

to save time and enable him to keep an appointment with his employer, used it on an errand of his own which took him two and a half miles out of his path of employment, and who collided, on his way back, with a third person, injuring him, cannot be said to have been then acting within the scope of his employment so as to charge his employer under the doctrine of respondeat superior.[2]

The provisions of the Motor Vehicle Act under which special concessions are made to automobile dealers in the matter of registration of machines, including a general registration number, under which all vehicles of the dealer are deemed to be registered "until sold or let for hire or loaned for a period of more than ten successive days," do not operate to estop a dealer who loans a machine thus registered by him to one of his employees for a brief outing, from denying that the machine was then being operated in his business, and thus escaping liability for the borrower's negligent operation of the car.[3]

§ 98. Use of Automobile in Going to and Returning from Work.—Reasoned authority undoubtedly is to the effect that, though the employer furnishes his employee with an automobile to use in the employment, it is not so in use when the servant employs it in going to or from his work outside the hours of his employment.[4] Nor is he at the time engaged in any duty incident to his employment.[5] The fact that the employer furnishes oil and gasoline for the car does not affect the case in the slightest degree.[6] And the fact that the machine is intrusted to the custody of the employee at all times and that he

2. Gousse v. Lowe, 41 Cal. App. 715, 183 Pac. 295.

3. Brown v. Chevrolet Motor Co. of Cal., 39 Cal. App. 738, 179 Pac. 697. For Motor Vehicle Act, see Stats. 1915, p. 377, § 9.

4. Nussbaum v. Traung Label etc. Co., 31 Cal. App. Dec. 778, 189 Pac. 728; Mauchle v. Panama-Pacific Int. Exp. Co., 37 Cal. App. 715, 174 Pac. 400.

5. Nussbaum v. Traung Label etc. Co., 31 Cal. App. Dec. 778, 189 Pac. 728.

6. Hall v. Puente Oil Co., 32 Cal. App. Dec. 306, 191 Pac. 39.

keeps it at his home, apparently makes no difference.[7] A dictum that in returning the machine to its garage at his home the employee would be acting within the scope of his employment, is probably not to be regarded as of much weight in this connection.[8] It is, of course, especially true that in going to or returning from work in his employer's machine, the employee is not acting within the scope of his employment when the trip is complicated by some independent purpose of his own. As, for instance, where he intends to get breakfast before going to work;[9] or is taking a friend with him to a lodge meeting at the town where he resides, before going home;[10] or in returning home, has turned out of his way to take a friend to the latter's destination.[11] But it has been held that an employee who is furnished by his employer with an automobile for use in his employment and also in pursuits of his own, and who, at the time of the accident, had left his employer's office for the day, but has gone in a direction opposite his home in order to have a check given the employer properly countersigned by the payor, but who, on returning to the place of his employment to get his overcoat before proceeding to his home, collided with a motorcycle being driven in an opposite direction, was acting within the scope of his employment, and that his negligent operation of the machine under such circumstances renders the employer liable. It should be noted, however, that the decision was not reached by a united court.[12]

7. Nussbaum v. Traung Label etc. Co., 31 Cal. App. Dec. 778, 189 Pac. 728.

8. Hall v. Puente Oil Co., 32 Cal. App. Dec. 306, 191 Pac. 39.

9. Nussbaum v. Traung Label etc. Co., 31 Cal. App. Dec. 778, 189 Pac. 728.

10. Hall v. Puente Oil Co., 32 Cal. App. Dec. 306, 191 Pac. 39.

11. Hirst v. Morris & Co., 31 Cal. App. Dec. 105, 187 Pac. 770.

12. Brimberry v. Dudfield Lumber Co., 60 Cal. Dec. 150, 191 Pac. 894. Shaw, J., in dissenting, declared that the decision appeared to be contrary to all authority.

Negligence Regarding Pedestrians.

§ 99. Duty Toward Persons in Street in General.—Aside from the mandate of the statute requiring drivers of motor vehicles to operate them in a careful and prudent manner and at a speed not greater than is reasonable and proper with regard to traffic, and not such as to endanger life, limb or property, the driver of a motor vehicle has been held bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights there with himself.[13] It is the duty of the driver of an automobile, where the view is unobstructed, to see persons on the road in front of the machine.[14]

§ 100. Right of Pedestrians to Use of Streets.—As to foot-passengers, the old common-law freedom of use of the king's highway has not been modified in California by statutory enactment, and it still remains the law that foot-passengers have the right to use and traverse the highway at all its points, being chargeable only for the exercise of a due amount of care, to be governed by the use of the highway actually made.[15] Thus, even in populous cities, pedestrians are not restricted to the crossings in traversing a street, but may cross at any point. And the same is true of their right to walk along the roadbed of a highway. Some cities, however, have compelled pedestrians in congested portions, to use authorized crossings alone.[16] A pedestrian, struck and injured by an automobile while he is walking in the center of a street, is not negligent as a

13. Zarzana v. Neve Drug Co., 180 Cal. 32, 179 Pac. 203. See infra, §§ 100–114, as to the reciprocal rights and duties of motorists and pedestrians on the streets, and the rules governing the liability of motorists for negligence. See note, 1 A. L. R., p. 840, as to injury by motor vehicle to person on sidewalk.

14. Warner v. Bertholf, 40 Cal. App. 776, 181 Pac. 808. See infra, § 157, as to proximate cause.

15. Woodhead v. Wilkinson, 181 Cal. 599, 10 A. L. R. 291, 185 Pac. 851; Raymond v. Hill, 168 Cal. 473, 143 Pac. 743; Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

16. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743. See HIGHWAYS.

matter of law in merely being where he was instead of walking along the sidewalk.[17] And the fact that a pedestrian, engaged in driving a cow along a highway, was on the left-hand side of the roadway when struck by an automobile which came up behind him—the roadway being sufficiently wide to enable the machine to pass without accident—does not constitute contributory negligence.[18]

§ 101. Reciprocal Duties of Motorists and Pedestrians. Persons alighting upon or walking across public streets where vehicles are constantly traveling to and fro must use ordinary care to see that they do not run into or are not run over by vehicles; and in turn it is the duty of drivers of vehicles to exercise ordinary care to prevent any injury being caused to such foot-passengers. It has been stated as the settled rule that the requirements as to the conduct of both the pedestrian and the driver of a vehicle are reciprocal and equal, and that neither has any right of way superior to the other.[19] But while both parties are charged with the same degree of care, the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of the foot-passenger. The degree of care exacted of both users of the highway is the same; the amount of care must of necessity vary in order that the degree may not. The driver of a motor vehicle,—a dangerous instrumentality capable of inflicting fatal injuries,—is charged with a greater amount of care than the pedestrian, in order that he may be bound to the same standard of ordinary care.[20]

17. Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94.

18. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358. See infra, §§ 122–125, as to use of left-hand side of road by vehicles; and supra, § 69, as to injury to pedestrian from tripping over rope used in towing machine.

19. Park v. Orbison, 29 Cal. App. Dec. 689, 692, 184 Pac. 428; Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 Pac. 342; Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505.

20. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743; Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 Pac. 287.

The driver of a motor vehicle has the right to assume that one standing in a place of safety will not suddenly leave that position and place himself in the path of the vehicle. On the contrary, he has the right to assume that he will not so act.[1]

§ 102. Negligence Toward Pedestrians in General.— Various combinations of acts and omissions, more or less unique, yet on the whole instructive, have been held, on the one hand, to constitute negligence toward pedestrians, and, on the other, to show freedom from it. Thus, a finding of negligence has been sustained in cases such as the following: Driving after dark along a street at the rate of twenty-five miles an hour, without front lights and without looking ahead, and with only one hand on the steering-wheel;[2] driving over a city street where there is considerable traffic, after dark, with very dim lights, at a speed of fifteen miles an hour and without warning signal;[3] driving at twenty-five miles an hour over a busy street, without warning, and within three feet of automobiles parked in the center of the street from behind which pedestrians are likely to emerge, though the available roadway is eighteen feet wide;[4] approaching a street intersection where pedestrians may be expected to cross, at ten miles an hour, without warning and with windshield clouded with rain, and doing so unnecessarily on the wrong side of the street.[5] And a finding of negligence was justified by the facts where the evidence showed that a pedestrian crossing a street saw a machine one hundred and fifty feet away coming at twelve miles an hour, and saw it change its course, that thereupon he endeavored to

1. Depons v. Ariss, 59 Cal. Dec. 351, 188 Pac. 797.

2. Meier v. Wagner, 27 Cal. App. 579, 150 Pac. 797.

3. Owens v. W. J. Burt Motor Car Co., 30 Cal. App. Dec. 767, 186 Pac. 821.

4. Webster v. Motor Parcel Del. Co., 41 Cal. App. 657, 183 Pac. 220. See infra, § 103, for other examples of negligence due to excessive speed.

5. Park v. Orbison, 29 Cal. App. Dec. 689, 692, 184 Pac. 428.

avoid it by stepping back, stopped again and stepped back, when it again turned toward him and hit him.[6]

But it is not negligence where the driver of a motor truck who, when a pedestrian suddenly leaves a place of safety and places himself in a position directly in the path of the truck, makes every effort both to check his machine and to deflect it to one side to avoid a collision.[7] And in an action by a spectator at an automobile race for injuries from one of the racing cars, evidence that the driver was skilled, that the car had been thoroughly inspected before the race, that the steering knuckle broke, thus depriving the driver of control, that he tried to veer from the spectator's direction, and at once applied the brakes, fails, it has been held, to show any negligence in the driver.[8]

§ 103. Excessive Speed.—The following are cases in which the predominant feature of the driver's negligence was excessive speed. Thus, under the rule that a driver is bound to drive at a speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, one approaching, at twenty-five miles an hour, a street intersection along a much traveled city thoroughfare, where pedestrians are crossing, is negligent.[9] And a similar speed past a street intersection where, owing to a slight shifting of his course, the driver strikes a pedestrian, has also been held to be negligence.[10] Racing with another machine over a city street in violation of the speed limit sustains a finding of negligence, though on seeing a small boy in the road the driver tries both to avoid him and to check his car.[11] Traveling over a city

6. Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 Pac. 342.

7. Depons v. Ariss, 59 Cal. Dec. 351, 188 Pac. 797.

8. Johnson v. Reliance Automobile Co., 23 Cal. App. 222, 137 Pac. 603. See infra, §§ 157, 158, as to proximate cause; and infra, §§ 164–166, as to last clear chance doctrine.

9. Clohan v. Kelso, 29 Cal. App. Dec. 103, 183 Pac. 349.

10. Simmons v. Stephens, 32 Cal. App. Dec. 685, 191 Pac. 978.

11. Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234.

street at forty miles an hour is negligence.[12] And even fifteen miles an hour, over a wet and slippery street crowded with vehicular traffic and pedestrians, has been held negligence for the rider of a motorcycle.[13]

§ 104. Duty on Approaching Pedestrians from Behind. The rule of reasonable precaution which the law enjoins on drivers of automobiles includes the necessity of making certain that foot-passengers are aware of the rearward approach of the vehicle, that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from surprise at knowledge of its unexpected approach, and, finally, that the vehicle is under such control as that it may be stopped promptly.[14] The vital question in such cases is whether the driver used every reasonable precaution to insure the pedestrian's safety.[15] Merely giving warning of the machine's approach, as by sounding the horn and by the noise occasioned by cutting out the muffler, is not enough.[16] Yet, under section 12 of the Motor Vehicle Act, requiring the driver to sound a warning "whenever necessary," and section 20a, requiring him to drive in a careful manner with due regard for the safety and convenience of pedestrians, he is not excused from sounding his horn by the fact that he is not attempting to pass the pedestrian but is trying to stop his machine. Nor is he excused from sounding his horn by the fact that the pedestrian sees the glare of the headlights, where the machine is not following the paved portion of the highway customarily used by motorists, since the mere sight of the headlights does not give warning of the deviation.[17] The driver of an auto-

12. Ellis v. Sanberg, 41 Cal. App. 506, 182 Pac. 792.

13. Zarzana v. Neve Drug Co,. 180 Cal. 32, 179 Pac. 203.

14. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743; Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

15. See infra, §§ 108, 109, 113, as to contributory negligence.

16. Raymond v. Hill, 168 Cal. 473, 148 Pac. 743.

17. Woodhead v. Wilkinson, 181 Cal. 599, 10 A. L. R. 291, 185 Pac. 851.

mobile who, on a foggy night, runs against a pedestrian preceding him along the roadway, the machine being without lights and no horn being sounded or warning given, cannot be said to be free from negligence.[18] And in view of the speed limits of the Motor Vehicle Act, as prescribed in section 22, and the requirement of sections 20 and 22 as to careful operation, a driver who, traveling along a highway at an unchecked speed of forty miles an hour, collides with a pedestrian whom he approaches from behind without effective warning, is guilty of negligence.[19]

§ 105. Duty Toward Persons Boarding or Alighting from Street-cars.—A municipal ordinance requiring automobiles to stop ten feet behind street-cars they may be following, in order to allow passengers to board and alight from the street-car, imposes on the motorist obligation not to trail street-cars so closely that they cannot comply with the ordinance, nor to attempt to pass a street-car approaching a street crossing until he is sure that it is not going to stop.[20] A driver who does not comply with the ordinance, but attempts to pass a street-car which has stopped for passengers, and injures a person who was intending to take the street-car, is guilty of negligence.[1] And the driver of a motor truck who, at a speed of twelve miles an hour, approaches a street-car stopped to allow passengers to alight, and attempts to pass the car when the roadway is so obstructed by the presence of another automobile that he is forced within four feet of the lower step of the street-car in violation of a city ordinance, thereby striking one who had just alighted, is guilty of negligence both in so violating the ordinance and also without reference to the violation.[2] Evidence that a girl

18. Manchle v. Panama-Pacific Int. Exp. Co., 37 Cal. App. 715, 174 Pac. 400.

19. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

20. Koehl v. Carpenter, 32 Cal. App. Dec. 331, 191 Pac. 43.

1. Mann v. Scott, 180 Cal. 550, 182 Pac. 281.

2. Bannister v. H. Jevne Co., 28 Cal. App. 133, 151 Pac. 546.

of fourteen standing in the street waiting for a street-car was struck by an automobile coming from the same direction at twenty miles an hour, which she unsuccessfully attempted to escape, warrants an inference of the driver's negligence sufficient to sustain a verdict.[3] But it has been held that the driver of an automobile was not guilty of any sufficient degree of carelessness at the time or immediately preceding an accident, as would justify a verdict against him, where the evidence discloses that with every appearance of caution he approached the point where the plaintiff and several other persons were standing on the street awaiting an oncoming street-car, his lights giving ample and sufficient warning of his approach, and that, swerving his car, he was in a position to have safely cleared the group, and would have done so without any injury to the plaintiff had she not done the unexpected thing of rushing into the open space which he was about to occupy, striking the side of his car and being thus injured.[4] Unless and until he has warning to the contrary, the driver of an automobile is under no obligation to anticipate that persons will jump from moving street-cars; nor is he under any obligation to so operate his machine as to protect one who jumps from a moving street-car into the street in front of the automobile, especially from a street-car which has just stopped to discharge passengers.[5]

§ 106. Unavoidable Accident.—Where there is a space of over fifteen feet clear roadway on either side of a pedestrian who has paused in the center of a street to allow an automobile to pass, and the presence of the pedestrian in the street could be discerned for a considerable dis-

3. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 Pac. 212.

4. Spring v. Towa, 33 Cal. App. Dec. 37, 192 Pac. 1051.

5. Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505. See infra, §§ 107, 108, 110, 114, as to contributory negligence; and infra, § 165, as to last clear chance doctrine.

tance, collision with him cannot be said to be an unavoidable accident.[6] The driver of an automobile which runs into a person engaged in mounting to the seat of a truck standing at the curb, though at an improper distance therefrom, cannot escape liability on the theory of unavoidable accident, where he approached the truck along a fairly lighted and unobstructed street, and on a line which, had he held to it, would have taken him safely past the truck.[7] Can a spectator, voluntarily attending an automobile race for speed and endurance upon a public highway and who occupies a reasonably safe position, recover for injuries inflicted by one of the racing automobiles which did not result from any want of care of the driver, or from any known or visible defect in the car, but by the unavoidable breaking of some parts of the automobile? The court of appeals did not find it necessary to pass upon this question, though it said that a negative answer was supported by decisions of courts of high repute.[8]

§ 107. Care Required of Persons in Street in General.—A pedestrian is bound generally to look after his own safety, and so it is his duty when crossing a highway where vehicles are to be looked for to use due care and caution to see that he is not in danger.[9] With reference to the amount of care required, as proportioned to the circumstances, the court of appeal, speaking through Justice Taggart, in considering the case of one employed to

6. Simmons v. Stephens, 32 Cal. App. Dec. 685, 191 Pac. 978.

7. Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 Pac. 1059.

8. Johnson v. Reliance Automobile Co., 23 Cal. App. 222, 137 Pac. 603 (citing authorities of other states to the effect recovery may not be had for injuries so sustained).

9. Owens v. W. J. Burt Motor Car Co., 30 Cal. App. Dec. 767, 186 Pac. 821; Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234. See supra, § 1, as to reciprocal character of duties to motorist and pedestrian; and infra, § 164, as to applicability of last clear chance doctrine to injured pedestrian.

oil street-car tracks and who was struck by an automobile while so employed, has said:

"The degree of care which in one case is insufficient to relieve from a charge of negligence in another might constitute more than ordinary prudence and caution. Had a pedestrian with no occupation requiring his presence in that part of the street devoted to the use of vehicles been struck by a passing vehicle while he was backing along the roadway without looking to see where he was going, it is clear that he would have been guilty of contributory negligence. But the rights of a laborer whose duties require him to be in the roadway cannot be determined by the same rule. Not that he is bound to exercise any less care, but because the care to be exercised must be determined from a different standpoint."[10]

Though one standing close by a plainly visible obstruction in the street may not be entitled, as a matter of law, to assume that he will not be run down by a passing automobile, he is in a position where reasonably prudent men might draw that conclusion as one of fact.[11] And the question of the contributory negligence of a pedestrian who steps from the curb to board a street-car and is struck by an automobile which, after delivering goods on the left-hand side of the street, has just been put again into motion, is one of fact for the jury.[12] In a case where the evidence showed that a girl of fourteen waiting for a street-car was struck by an automobile coming at the speed of twenty miles an hour, which she endeavored to avoid, the facts were said to warrant an inference of freedom from contributory negligence.[13]

§ 108. Effect of Imminent Peril.—Under the rule that imminent peril may excuse imprudent conduct,[14] it is gen-

10. King v. Green, 7 Cal. App. 473, 94 Pac. 777. See NEGLIGENCE.

11. Regan v. Los Angeles Ice & Cold Storage Co., 31 Cal. App. Dec. 739, 189 Pac. 474.

12. Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 Pac. 287.

13. Anderson v. Los Angeles Trans. Co., 170 Cal. 66, 148 Pac. 212.

14. See supra, § 72. See NEGLIGENCE.

erally held that the act of a frightened pedestrian even in plunging into danger is not contributory negligence. Thus, running in front of an approaching automobile in terror caused by its sudden discovery and noise,[15] or jumping, in sudden panic, in front of a machine which has approached from behind at forty miles an hour without any warning being given till it is almost upon the foot-passenger,[16] or clutching the front of an automobile in confusion at its sudden approach, thereby aggravating the injury,[17] has in each instance been held not to constitute contributory negligence. A pedestrian walking in the center of the street accompanied by his wife, who suddenly becomes aware of the approach of an automobile from behind which has given no warning, and who endeavors to push his wife out of danger and then save himself, and in doing so gets in the way of the machine and is injured, is not necessarily guilty of contributory negligence, but is entitled to have the question determined by the jury.[18] But it has been held that a finding of the trial court of contributory negligence in a case where a person standing in the street waiting for a street-car suddenly becomes aware of an oncoming automobile near at hand, and, in confusion, dashes forward and into the side of the machine as it swerves in such manner as to avoid him had he remained still, will not be disturbed on appeal, in the absence of a clear showing of an abuse of discretion.[19]

§ 109. Right to Assume Lawful Conduct of Motorist in General.—The law is well settled that a pedestrian crossing a street has a right to assume, until the contrary reasonably appears, that drivers of automobiles will keep a reasonable lookout ahead, and exercise ordinary care to

15. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743.

16. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

17. Ellis v. Sanberg, 41 Cal. App. 506, 182 Pac. 792.

18. Blackwell v. Rennick, 21 Cal. App. 131, 131 Pac. 94.

19. Spring v. Tawa, 33 Cal. App. Dec. 37, 192 Pac. 1051.

avoid causing him injury.[20] And, in determining what is prudent conduct on the pedestrian's part, it may be assumed that automobiles will be operated in a reasonable and cautious manner.[1]

The question of the pedestrian's negligence must, under the requirement of ordinary care, be examined in the light of all the circumstances, one of which may be his knowledge of a statute or ordinance prescribing fixed regulations for observance by motorists.[2] A pedestrian is not guilty of negligence as a matter of law in attempting to cross a city street, although he sees two automobiles approaching from opposite directions and likely to pass at a point in front of him, as he has the right to assume that they will obey the provision of the law (Motor Vehicle Act, section 20b) requiring vehicles proceeding in opposite directions to pass each other to the right, each giving to the other one-half the road as nearly as possible, and that they will not pass so close together that a pedestrian cannot avoid one without being hit by the other.[3] A pedestrian about to cross a street in the business section of a large city, who looks to his left and sees an automobile approaching, and then looks to his right and sees another coming a block away, and then proceeds to cross, keeping his eyes on the machine coming from the left, and not again looking to the right till he reaches the center of the street, is not guilty of contributory negligence as a matter of law. Under such circumstances, the pedestrian has the right to assume that the driver approaching from his right will travel along the opposite side of the street so as not to endanger him in any event till he has passed its center, and he is further entitled to the assurance that the driver will use such care and circumspection as the

20. Owens v. W. J. Burt Motor Car Co., 30 Cal. App. Dec. 767, 186 Pac. 821; Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234.

1. Off v. Crump, 40 Cal. App. 173, 180 Pac. 360.

2. Koehl v. Carpenter, 32 Cal. App. Dec. 331, 191 Pac. 43; Mann v. Scott, 180 Cal. 550, 182 Pac. 281.

3. Off v. Crump, 40 Cal. App. 173, 180 Pac. 360.

circumstances require, will not approach at an excessive speed, and will not endanger him without warning.[4] A pedestrian has a right to assume that an automobile approaching from behind will follow the usual custom of drivers and remain upon the paved portion of the highway, and will not deviate to the unpaved portion.[5]

An ordinance giving moving apparatus of the fire department right of way over streets when going to a fire, and punishing those in charge of street-cars or other vehicles who carelessly obstruct it, may be relied on by a pedestrian who is struck and injured by the fire chief's automobile as it swerves from the roadway on to the curb to avoid colliding with a street-car negligently crossing the street, and who thereupon sues the street-car company; since the ordinance was enacted not only to give the fire department right of way, but to safeguard the public against the danger of collisions, and the pedestrian therefore comes within the rule that one who seeks to avail himself of a legislative enactment must belong to the class the legislative body sought to benefit.[6]

§ 110. When Boarding, Alighting from, or Crossing in Front of Street-cars.—Under the rule that a pedestrian's contributory negligence must be determined in the light of his possible knowledge of laws regulating motorists, the question whether a pedestrian about to board a street-car, who sees an automobile approaching from the same direction and parallel with the street-car, would be justified in relying upon the automobile driver's obedience to a city ordinance requiring automobiles to stop ten feet behind street-cars halting to receive or discharge passengers, and therefore in crossing in front of the machine, is one for the jury, it being a question about which reasonable men might well differ.[7] And the same is true of one who, on

4. Park v. Orbison, 29 Cal. App. Dec. 689, 692, 184 Pac. 428.

5. Woodhead v. Wilkinson, 181 Cal. 599, 10 A. L. R. 291, 185 Pac. 851.

6. King v. San Diego Electric Ry. Co., 176 Cal. 266, 168 Pac. 131.

7. Mann v. Scott, 180 Cal. 550, 182 Pac. 281.

alighting from a street-car, is killed by an automobile before reaching the curb.[8] Since contributory negligence cannot be predicated upon the assumption that one will violate the law, a passenger alighting from a street-car at a customary stopping place, and who remains within the safety zone within which automobiles are forbidden to travel by municipal ordinance, is not guilty of contributory negligence in failing to look up and down the street to ascertain whether automobile drivers are violating the ordinance, in the absence of any warning or reason to believe that they would do so. Being lawfully within the prescribed safety zone, the passenger has the right to assume that for the time being he is as safe from collisions with automobiles as he would be upon the sidewalk.[9] And a pedestrian crossing a street in front of a standing street-car has the right to assume that an automobile will not without warning, suddenly, and at a dangerous rate of speed, emerge from behind the street-car.[10] So, also, a pedestrian who, after looking for automobiles, crossing in front of a street-car in obedience to the motorman's signal, is not guilty of contributory negligence, where he is struck by an automobile coming up behind the street-car on the wrong side of the street in violation of an ordinance and at a speed of fifteen or more miles an hour, and where, under the circumstances, had he looked, he might not have seen the automobile in time to save himself.[11]

§ 111. Duty of Pedestrian to Look, in General.—It has been said that there is no positive duty imposed on a pedestrian about to cross a street to stop, look and listen;[12] at least, that he is not bound to look and listen re-

8. Koehl v. Carpenter, 32 Cal. App. Dec. 331, 191 Pac. 43.

9. Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078.

10. McMullen v. Davenport, 30 Cal. App. Dec. 807, 186 Pac. 796.

11. Harris v. Johnson, 174 Cal. 55, Ann. Cas. 1918E, 560, 161 Pac. 1155. See supra, § 105, as to duty of motorist.

12. Koehl v. Carpenter, 32 Cal. App. Dec. 331, 191 Pac. 43; Mann v. Scott, 180 Cal. 550, 182 Pac. 281. See note, 9 A. L. R., p. 1248,

gardless of the circumstances of his environment.[13] Thus, where there is a plainly visible obstruction in a street, one taking a position on or immediately in front of it, would be in a position of safety, and might be relieved from the duty of observing traffic as he would be if he remained on the sidewalk.[14] But though it may be true as an academic statement that the pedestrian is under no absolute legal duty to look, under all circumstances and on all occasions, it has been abundantly held that it is his duty to look both ways for automobiles and other vehicles before starting to cross a street, particularly a busy city thoroughfare, and that a failure to do so is contributory negligence.[15] This is a continuing duty, and is not met by looking once and then looking away.[16] In crossing or traveling a city street, the pedestrian must use ordinary care, and reasonably exercise his faculties for his own protection.[17] He must be alert and watchful, and is bound to do more than ascertain whether there is any obstruction in his immediate path. Thus, it has been held that a pedestrian who attempts to cross a street intersection in a city at a time of heavy traffic, and who traverses three-fourths of the distance across, looking straight ahead, without glancing to either side, and remaining absolutely oblivious of the approach of an automobile until the moment of impact, is guilty of contributory negligence as a matter of law.[18] But, as a general rule, it is for the jury to determine whether the pedestrian was or was not negligent.[19]

as to duty of pedestrian, before crossing street, to look for automobiles approaching on intersecting street.

13. Park v. Orbison, 29 Cal. App. Dec. 689, 692, 184 Pac. 428.

14. Regan v. Los Angeles Ice & Cold Storage Co., 31 Cal. App. Dec. 739, 189 Pac. 474.

15. Moss v. H. R. Boynton Co., 30 Cal. App. Dec. 654, 186 Pac. 631; Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8; Davis v. John Breuner Co., 167 Cal. 683, 140 Pac. 586; Mayer v. Anderson, 36 Cal. App. 740, 173 Pac. 174.

16. Moss v. H. R. Boynton Co., 30 Cal. App. Dec. 654, 186 Pac. 631.

17. Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 Pac. 287.

18. Mayer v. Anderson, 36 Cal. App. 740, 173 Pac. 174.

19. Kerner v. Spiegl, 34 Cal. App. 162, 166 Pac. 1013; Irwin v. Golden

§ 112. When Crossing Between Street Intersections.—A pedestrian who attempts to cross a street between the regular crossing points at street intersections must exercise greater precautions than if he were at an established crossing.[20] This is especially true if his view is at all obstructed,[1] or if he undertakes to cross, not at right angles, but on a diagonal, in which case it is his duty to look for the approach of cars from both directions. The observation of due care by a pedestrian under such circumstances is not fulfilled merely by looking to left and right as he steps upon the street. He must exercise that care during all the time he is crossing.[2] For a lack of ordinary prudence in this respect he may be guilty of contributory negligence as a matter of law.[3]

§ 113. Automobiles Coming from Behind.—A pedestrian is under no absolute legal obligation to look out for automobiles coming from behind, his duty, at most, being for the jury to determine.[4] And so it has been held, where both pedestrians and vehicles were rightfully using the left-hand side of the highway (the right being inaccessible to vehicles), the pedestrians, while keeping a reasonable outlook ahead, are under no legal obligation to look back

State Auto Tour Corp., 178 Cal. 10, 171 Pac. 1059. See Owens v. W. J. Burt Motor Car Co., 30 Cal. App. Dec. 767, 186 Pac. 821 (where, under the circumstances the pedestrian was held not negligent); and Webster v. Motor Parcel Del. Co., 41 Cal. App. 657, 183 Pac. 320 (where pedestrian, struck by automobile which approached without warning, was held not guilty of contributory negligence); see supra, §§ 109, 110, as to duty to anticipate infractions of law.

20. Moss v. H. R. Boynton Co., 30 Cal. App. Dec. 654, 186 Pac. 631; Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8. See note, 6 A. L. R., p. 321, as to cutting corners as negligence.

1. Moss v. H. R. Boynton Co., 30 Cal. App. Dec. 654, 186 Pac. 631.

2. Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8.

3. Moss v. H. R. Boynton Co., 30 Cal. App. Dec. 654, 186 Pac. 631.

4. Regan v. Los Angeles Ice & Cold Storage Co., 31 Cal. App. Dec. 739, 189 Pac. 474; Raymond v. Hill, 168 Pac. 473, 143 Pac. 743; Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94. See supra, § 104, as to duty of motorist.

to discover danger.[5] In other words, a pedestrian is not guilty of contributory negligence as a matter of law because he fails to look behind him and discover an approaching car which may heedlessly run him down.[6] Under this rule, a pedestrian crossing a city street, who looks first to the left and, after passing the center of the street, looks to the right, these being the directions from which vehicles should normally approach, is not guilty of contributory negligence in not anticipating that, after he had passed the center of the street, an automobile coming from his left, would, without warning, run upon him from behind.[7]

Laborer upon the street.—A laborer employed to oil street-car tracks, whose proper discharge of his duties requires him to move backward along the rail which he is oiling, and who does this in such a manner as to face in the direction from which any vehicle, obeying the law of the road as defined by section 2931 of the Political Code, would approach, and who also looks in the other direction often enough to satisfy the trial court that he is exercising due care, cannot be said to be guilty of contributory negligence as a matter of law, when struck by a passing automobile. The care required under the circumstances, and his exercise of it, are questions of fact.[8]

§ 114. Boarding or Alighting from Street-cars.—It has been held that a pedestrian who, on stepping into the roadway to take a street-car, looks in both directions for automobiles when near the curb, but does not look again until suddenly confronted by one near the center of the street, is guilty of contributory negligence.[9] But, in conformity to the rule given in the preceding section, as a general

5. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743.

6. Regan v. Los Angeles Ice & Cold Storage Co., 31 Cal. App. Dec. 739, 189 Pac. 474.

7. Kuhns v. Marshall, 30 Cal. App. Dec. 730, 186 Pac. 632.

8. King v. Green, 7 Cal. App. 473, 94 Pac. 777.

9. Spring v. Tawa, 33 Cal. App. Dec. 37, 192 Pac. 1051.

rule, the mere failure to note the approach of automobiles from behind while crossing the street, or while boarding or alighting from street-cars, does not constitute contributory negligence as a matter of law;[10] the question is much more properly one of fact for the jury.[11] On alighting from a street-car, a person is under no positive legal duty to look out for automobiles.[12] And especially is this true where he remains within a safety zone established by ordinance, and within which automobiles are forbidden to pass. While there, no duty to look out for automobiles devolves upon him, and an instruction to the contrary is properly refused.[13]

Negligence Regarding Animals.

§ 115. Duty Toward Animals in Roadway in General.—Both an automobile driver and the rider of a horse have an equal right to the use of the highway.[14] The driver of an automobile who approaches a horseback rider from behind and observes that the rider apparently does not hear him sound the horn of his automobile, is under obligation to slow down and even stop his car if necessary to avoid a collision.[15] The duties of an automobile driver approaching a frightened horse are not governed solely by the provisions of the Motor Vehicle Act. With the knowledge that a frightened horse is before him in the highway, it is the automobile driver's duty to keep a lookout ahead, and as he approaches horse and rider to note the movements of the horse, and if he sees, or by the exercise of reasonable caution could see, that the horse is excited, bucking

10. McMullen v. Davenport, 30 Cal. App. Dec. 807, 186 Pac. 796; Fisk v. Poplin, 31 Cal. App. Dec. 786, 189 Pac. 722. And cases cited supra, § 113.

11. Bellinger v. Hughes, 31 Cal. App. 464, 160 Pac. 838; Warner v. Bertholf, 40 Cal. App. 776, 181 Pac. 808.

12. Koehl v. Carpenter, 32 Cal. App. Dec. 331, 191 Pac. 43. See supra, § 105, as to duty of motorist.

13. Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078.

14. Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024; Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58.

15. Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58.

and manifesting unmistakable fright, to slow up, stop his machine, or do whatever is reasonably necessary to relieve the rider of his perilous position. Ordinary care requires this, and a failure on the motorist's part in these respects renders him guilty of negligence. The fact that the horseback rider does not signal the driver to stop does not relieve the latter from taking necessary precautions to avoid an accident. The requirement of section 20j of the Motor Vehicle Act, that the driver of a motor vehicle approaching a frightened horse shall reduce the speed of his vehicle and, "if requested by signal or otherwise by the driver or rider of such horse or horses, shall not proceed farther toward such animal or animals, unless such movement be necessary to avoid accident or injury, until such animal or animals be under the control of the driver or rider thereof," does not commit to the discretion of the automobile driver the determination of whether a stop is necessary so absolutely that his decision is conclusive unless the discretion is abused. The question as to whether his conduct amounts to ordinary care remains open for determination by the jury, under all the circumstances of the particular case. Decisions in other jurisdictions, apparently announcing a contrary rule, are distinguished by the California court.[16]

§ 116. Contributory Negligence.—Though a horseback rider who is deaf is bound to use even greater care than a person of good hearing, in order to exercise that care which is required of a person having unimpaired faculties, he is not strictly bound to act as one who had heard a warning or is in fact possessed of ordinary hearing. When proceeding along a roadway on a reliable horse, he is not guilty of contributory negligence because he fails to constantly look behind him for the approach of automobiles, even though the hearing in one of his ears is de-

16. Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024. See infra, § 165, as to last clear chance doctrine.

stroyed, and he is hard of hearing; though both the horseback rider and the automobile driver have the right to the use of the road, the latter would be, under the circumstances, in the better position to avoid a collision.[17] The fact that a frightened and plunging horse has carried his rider to the left-hand side of the highway, and the rider is endeavoring to return him to the right-hand side when struck by a passing automobile, does not constitute negligence per se in the rider, preventing his recovery for resulting injury.[18] Under the imminent peril rule, it has been held that a man riding on horseback and leading an unbroken horse which he holds by a lariat, and which becomes frightened and starts to run across the street, just as an automobile approaches, is not guilty of negligence merely because he retains hold of the lariat instead of dropping it and letting the horse run away, or because, after checking the horse, he attempts to get across the street in its wake, instead of trying to return with it to the side of the street from which they started. Nor is it inherently negligent to take an unbroken horse upon the street.[19]

Duty in Respect to Other Vehicles.

§ 117. In General.—A municipal ordinance declaring it unlawful to propel any vehicle on the streets in a backward direction if, by so doing, the free and uninterrupted passage of any vehicle or street-car is impeded, has no application to the effort of a chauffeur to back his automobile into a vacant parking space in a congested street, where such space is limited.[20] It has been held that where, in violation of the express requirements of section 20c of the Motor Vehicle Act, the driver of a motor truck who, in coming up behind and passing to the left of a

17. Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58.

18. Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024.

19. Townsend v. Butterfield, 168 Cal. 564, 143 Pac. 760.

20. Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8.

steam roller, turned again to the right into the roller's path before he was clear of it, and crushed the left leg of a helper on the roller, who was riding with his legs hanging over the side, was guilty of negligence, though he sounded his horn and would have cleared the roller though not the helper's legs. In view of the noise made by the roller, the sounding of the horn was not in itself an adequate precaution against accident. The driver of the truck was bound to use "every reasonable precaution to insure safety," as required by the act. Nor was the margin of distance between the vehicles allowed by the motor-truck driver sufficient to save him from the charge of reckless, willful and wanton negligence. In such a case the appellate court said by way of obiter that the trial court would, under such circumstances, be justified in directing a verdict for the plaintiff. Moreover, where the record discloses negligence on the part of an automobile driver so great as to be termed "reckless, willful and wanton," the defense of contributory negligence of the plaintiff cannot be urged.[1] Evidence that the driver of an automobile which collided with a motorcycle turned out to pass a wagon in violation of the law requiring that, in turning out to pass a slower-moving vehicle, the highway must be clear for a hundred yards to the front, will, if sufficient to satisfy the jury, support a recovery.[2]

§ 118. Automobiles.—Willful injury perpetrated in the operation of an automobile is as legally reprehensible as in the operation of any other agency. Thus, one who willfully, that is, intentionally, runs his automobile into another machine coming from the opposite direction, when he has a clear opportunity to avoid doing so, would, where he injures a person in so doing, be no less guilty of a

1. Moreno v. Los Angeles Transfer Co., 30 Cal. App. Dec. 696, 186 Pac. 800.

2. Wiley v. Young, 178 Cal. 681, 174 Pac. 316; Stats. 1913, p. 647. See supra, § 7, as to right of operator of unregistered vehicle to recover for negligent injury by another.

crime than if he had committed an assault by other means.[3] And though an occupant of an automobile following in the wake of another, who, having control over his machine, deliberately runs it against the automobile ahead in order to save himself from disaster, the act is, nevertheless, wrongful and actionable.[4] Where a collision between automobiles occurs because both machines are needlessly driven along the center line of the roadway, each driver is guilty of negligence, and neither can recover against the other.[5] And where the owner of an automobile leaves it standing at night by the curb of a street traveled by other machines, without any rear light burning to indicate its presence to drivers coming from that direction, he may be deemed guilty of negligence contributing to a collision in which his automobile was damaged.[6]

§ 119. **Bicycles.**—An automobile driver who is driving on the proper side of the street in plain view of an approaching bicycle rider is not ordinarily held responsible for an ensuing collision.[7] However, the circumstances may render him liable. For example: Evidence that an auto truck was traveling about thirty miles an hour, that it did not stop after colliding with a bicycle rider preceding it on the street, that no horn was blown, that the truck was in charge of two men, who were looking ahead with nothing to obstruct their vision, and that the truck crowded the bicycle rider in toward the curb, swerving toward the curb as it struck him, has been held sufficient to support a finding of negligence in the operation of the truck.[8]

3. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

4. Tognazzini v. Freeman, 18 Cal. App. 468, 123 Pac. 540.

5. Grover v. Morrison, 32 Cal. App. Dec. 273, 190 Pac. 1078.

6. Mullin v. Ye Planry Bldg. Co., 32 Cal. App. 6, 161 Pac. 1008.

7. Konig v. Lyon, 33 Cal. App. Dec. 67, 192 Pac. 875. See infra, § 125, as to collision with bicycle when using wrong side of street.

8. Guderitz v. Boadway Bros., 39 Cal. App. 48, 177 Pac. 859.

It is the duty of a deaf person, riding a bicycle, to be especially prudent and careful, to keep himself informed of the approach of automobiles and other vehicles from behind, so as to protect himself from injury.[9] The fact that a bicycle rider is struck by an automobile suddenly appearing from behind a street-car does not necessarily make him guilty of contributory negligence.[10]

§ 120. **Horse-drawn Vehicles.**—An automobile driver who on a wide and unobstructed highway approaches a horse and buggy from behind without warning, and does not attempt to turn out until too late to avert a collision, thus striking it and causing a runaway, is guilty of negligence.[11] And where an automobile, in passing, strikes with its rear wheel the rear wheel of a buggy standing at an angle at the curb, because the horse attached to the buggy has backed a few inches, the evidence may be deemed sufficient to sustain a finding of negligence on the part of the automobile driver in not leaving a greater clearance space between the buggy and his machine. A traffic ordinance which forbids vehicles being stopped on the street unless the side nearest the curb is not more than two feet distant therefrom (it being provided that the ordinance shall not apply in certain excepted cases among which is that of an emergency), does not make it negligence as a matter of law for the driver of a horse and buggy to stop at the side of the street with his nearest rear wheel four feet from the curb, where the parking space is so restricted by other vehicles that he can get no closer, in which position the rear of his buggy is struck by a passing automobile. The question of negligence in such case is for the jury, which may well find that the con-

9. Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323. See infra, § 128, as to overtaking and passing bicycles.

10. Olsen v. Levy, 8 Cal. App. 487, 97 Pac. 76.

11. Freiburg v. Israel, 30 Cal. App. Dec. 961, 187 Pac. 130.

ditions constitute an "emergency" within the meaning of such an ordinance.[12]

§ 121. **Street-cars.**—It is true, generally, and more especially where the rest of the street is not passable, that the driver of an automobile has the right, always subject to the duty to exercise due care, to drive on the part of the street occupied by the street-car rails.[13] But it is the duty of drivers of automobiles, traveling along streets upon which street-car tracks are laid, to yield the right of way to street-cars when they can reasonably do so.[14] For a street-car to coast down grade at thirty miles an hour without warning signal and strike an automobile stalled near the track and in plain view is negligence in the street-car company.[15]

§ 122. **Law of the Road in General.**—So long continued and universal has been the custom in California for approaching vehicles or pedestrians to pass to the right, and to pass to the left where the approach is made from behind another vehicle or pedestrian, that it may be said to be a part of the common law of the state. The custom has, in part, been crystallized into statutes[16] which declare it the duty of drivers of all motor vehicles to pass to the right of an approaching person or vehicle, to give reasonable warning of approach, and to use every precaution to insure the safety of the other persons or animals, and to pass to the left on approaching any person or vehicle from the rear. The effect of these laws, as well as of the custom, is to prompt vehicles generally to use the right-hand

12. Collins v. Marsh, 176 Cal. 639, 169 Pac. 389.

13. Langford v. San Diego Elec. Ry. Co., 174 Cal. 729, 164 Pac. 398.

14. Busch v. Los Angeles Ry. Co., 178 Cal. 536, 2 A. L. R. 1607, 174 Pac. 665. See infra, § 128, as to overtaking and passing street-cars.

15. Turner v. Los Angeles Ry. Corp., 31 Cal. App. Dec. 236, 188 Pac. 56. See infra, § 124, as to propelling street-car forward on left-hand track.

16. Stats. 1905, p. 816; Stats. 1907, pp. 916, 917, § 4, subd. 1; Stats. 1907, pp. 916, 917, § 3, subd. 3.

portion of the highway.[17] And this is true whether they actually meet other vehicles or persons traveling in the opposite direction or not.[18] It should be noted that the present provision of the Motor Vehicle Act (section 20a,) is that drivers shall travel on the right-hand side of the highway "wherever practicable," and "on all occasions" unless the left-hand side is clear for a hundred yards, and "in all cases" where crossing an intersecting highway. But while one driving on the wrong side of the road assumes the risk, and is required to use greater care, still the rule as to the use of the right-hand side, whether of legislative or common-law origin, is not a hard-and-fast one. In other words, the fact that a driver has taken the wrong side of the highway is not conclusive but only prima facie evidence of negligence, which may stand as proof of the fact or be rebutted by the circumstances of the particular case.[19] The case ordinarily differs from a direct violation of an express legislative command, such as a violation of the speed law, which is negligence per se.[20] Driving along the left-hand side of a street is not, of itself, an act of negligence. It becomes so, if at all, only because of the surrounding circumstances, or because it has been forbidden by law or municipal ordinance.[1] However, where a chauffeur unnecessarily operates his machine on the left-hand side of the street in violation of a city ordinance, it is negligence per se.[2] A municipal ordinance requiring motorists to turn to the right on meeting other

17. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743; Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319.

18. Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319.

19. Hagenah v. Bidwell, 31 Cal. App. Dec. 765, 189 Pac. 799; Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781; Todd v. Orcutt, 29 Cal. App. Dec. 572, 575, 183 Pac. 963; Busch v. Los Angeles Ry. Co., 178 Cal. 536, 2 A. L. R. 1607, 174 Pac. 665 (applying rule to street-car); Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319.

20. Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319. See infra, §§ 157, 160, as to proximate cause.

1. Harris v. Johnson, 174 Cal. 55, Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 Pac. 1155.

2. Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37.

vehicles and "on all occasions" to travel on the right-hand side of the street as near the right-hand curb as possible, has in effect the same meaning as the provision of the Motor Vehicle Act, that drivers of vehicles, "wherever practicable," shall travel on the right-hand side of the highway.[3]

§ 123. Permissible Uses of Left-hand Side of Roadway. The left-hand side of a street may be used by a truck to discharge its load, by a coach, buggy or automobile to allow passengers to alight, and by the driver of a delivery wagon in pursuance of his employment. Also, as a matter of convenience, funerals may be formed there.[4] But the driver of an automobile, in delivering goods on the left-hand side of the street, has no right to violate a traffic ordinance which forbids any vehicle to stop on any street with its left-hand side toward or along the curb.[5] A municipal ordinance requiring vehicles to travel on the right-hand side of the street must be reasonably construed, and has no reference to the right of chauffeurs, in congested districts of the city, where the parking area is limited and the vacant space in that area even more limited, to back their automobiles into such limited space, even though, by so doing, they travel temporarily in the wrong direction for the side of the street they are on.[6] So an automobile driver has a right to travel on the left-hand side of the street when the right-hand side is inaccessible on account of construction work,[7] or where it is unsuitable for vehicu-

3. Humphrey v. United States Macaroni Co., 33 Cal. App. Dec. 219, 193 Pac. 609. See supra, § 100, as to law of road applying to pedestrian; supra, § 116, as to law of the road applied to rider of frightened horse; and infra, §§ 137–139, as to right of way at street intersection.

4. Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931.

5. Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 Pac. 287. See infra, § 127, as to applicability of statute requiring vehicles on meeting to turn to right, to standing vehicle.

6. Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8. See supra, § 68, as to backing machine on wrong side of street in effort to park.

7. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743.

lar traffic, as by reason of raised street-car tracks, or other obstacles, the Motor Vehicle Act only requiring use of the right-hand side where practicable.[8] So, too, an automobile driver may be compelled to swerve to the left-hand side to avoid a collision, and if he does, his presence there is not necessarily negligent.[9] As in cases generally, the question of negligence is one of fact and not of law.[10]

§ 124. **By Street-cars.**—In the absence of a statute or municipal ordinance forbidding the practice, it is not negligent, as a matter of law, for a street-car company to run its car forward along the left-hand track, where it collided with an automobile. It has been said that the motorman operating the car in that fashion is not obliged to exercise "special and particular" care to avoid collisions with automobiles and other vehicles going in the other direction; but that it is enough if he exercises reasonable and ordinary care. And so, when the jury finds that the street-car was being propelled at a speed of not more than four miles an hour, that its interior lights were lighted and its headlight was burning brightly, and that its gong was sounded, it cannot be contended that the street-car company was negligent in not giving warning of its unusual method of operating its car. Nor can an automobile driver, who, while endeavoring to pass to the left of a standing automobile, runs his machine into the side of the street-car, which, in the exercise of ordinary care, he should have seen, be held free from contributory negligence as a matter of law.[11]

§ 125. **Instances of Improper Use.**—The fact that the night was so dark that an unlighted vehicle could not be seen even a short distance ahead, does not excuse the neg-

8. Todd v. Orcutt, 29 Cal. App. Dec. 572, 575, 183 Pac. 963.

9. Hagenah v. Bidwell, 31 Cal. App. Dec. 765, 189 Pac. 799.

10. Kerner v. Spiegl, 34 Cal. App. 162, 166 Pac. 1013.

11. Busch v. Los Angeles Ry. Co., 178 Cal. 536, 2 A. L. R. 1607, 174 Pac. 665.

ligence of an automobile driver in traversing the left-hand side of the roadway where he collided with a buggy; rather the act aggravates the negligence, as under such circumstances it is his duty to use exceptional care.[12] A collision between a bicycle rider coasting downgrade toward an intersecting street at eight miles an hour and unable to check his speed because his brake will not work, and an automobile being operated on the wrong side of the intersecting street in violation of a city ordinance, does not present a case of inevitable accident. Nor is the bicycle rider in such a case guilty of contributory negligence as a matter of law.[13]

§ 126. Duty of Slow-moving Vehicles.—The provision of the Motor Vehicle Act that "the person in control of any vehicle moving slowly along and upon any public highway shall keep such vehicle as closely as practicable to the right-hand boundary of the highway, allowing more swiftly moving vehicles reasonably free passage to the left," is elastic, and does not attempt to lay down a definite and rigid rule as to the distance which the slowly moving vehicle must keep from the curb. Convenience, condition of the street, freedom of the street from other vehicles, or, on the other hand, its more or less crowded condition, must all be taken into consideration in determining the position upon the street which the slowly moving vehicle must occupy in order that the person propelling it or driving it shall be free from negligence. Hence, one who is propelling a loaded push-cart along the roadway of a street, and who in order to avoid the jolting of his load by the rough pavement takes a position in the center of the street along a car-track, where the pavement is smooth, the street being empty of vehicles at the time, is not guilty

12. Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319.

13. Baillargeon v. Myers, 27 Cal. App. 187, 149 Pac. 378. See infra, § 127, as to duty in passing where vehicle is on wrong side of street; infra, § 160, as to proximate cause.

of negligence, as a matter of law, contributing to his injury by an automobile coming up behind him. Nor would the fact that the night was foggy convict him of such negligence.[14] A motor truck traveling at eighteen miles an hour in a district of a city where the speed limit as fixed by ordinance is twenty miles is not "moving slowly" within a further provision of the ordinance that vehicles moving slowly shall keep as near to the right-hand curb as possible.[15]

§ 127. Duty on Meeting and Passing Other Vehicles.— An automobile driver who on meeting another car turns out to the left instead of the right, thus violating the law of the road, is, in general, guilty of negligence.[16] But sudden peril may excuse his doing so,[17] as where, on entering an intersecting highway by a left-hand turn, he suddenly encountered another machine approaching at high speed from the left.[18] So, too, where a motorcycle is suddenly confronted by an automobile rushing at him from a short distance at high speed, the driver of the motorcycle may very properly conclude in the instant allowed for action, that a turn to the left is the safer course.[19] The statute providing that when vehicles meet, the drivers of each must turn seasonably to the right of the center of the highway, so as to pass without interference,[20] applies only to moving vehicles. It does not apply to the delivery of goods from a standing vehicle on the left-hand side of the street.[1]

14 Mauchle v. Panama-Pacific Int. Exp. Co., 37 Cal. App. 715, 174 Pac. 400. See infra, § 159, as to proximate cause.

15. House v. Fry, 30 Cal. App. 157, 157 Pac. 500.

16. Dilger v. Whittier, 33 Cal. App. 15, 164 Pac. 49.

17. Hirst v. Morris & Co., 31 Cal. App. Dec. 105, 187 Pac. 770; Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

18. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

19. Hirst v. Morris & Co., 31 Cal. App. Dec. 105, 187 Pac. 770.

20. Pol. Code, § 2931.

1. Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931.

Whether an automobile driver traveling on the right side of the street, on encountering another machine coming from the opposite direction and traveling on the wrong side of the street, acted like a reasonably prudent man in turning out to the left in an effort to avoid a collision, is, generally speaking, a question for the jury.[2]

Meeting and passing bicycles.—It is the duty of the driver of an automobile who is traveling to the left of the center of the street to turn out to the right so as to give the right of way to a bicycle rider approaching from the opposite direction. And the bicycle rider has the right to expect that the driver will do this, even though only a part of the machine is to the left of the center of the street. That a bicycle rider traveling on the right side of the road who sees a heavy auto truck approaching on the wrong side should give way to it is not, as a general proposition, the law of California.[3]

§ 128. Duty on Overtaking and Passing.—It is negligence, in the absence of special excusatory circumstances, to turn out to the right in overtaking and passing another vehicle, instead of turning out to the left, as the law requires.[4] Thus, driving at high speed, without warning, along a city street, and bringing about a collision with a bicycle going in the same direction by swerving to the right instead of turning out to the left, is negligence.[5] And it has been held that where the driver of a huge machine traverses a twenty-five foot roadway over which there is a heavy traffic at eighteen miles an hour, and on overtaking a bicycle rider who has turned out to the right to pass an approaching automobile turns to the right in-

2. Saylor v. Taylor, 29 Cal. App. Dec. 449, 183 Pac. 843.

3. Konig v. Lyon, 33 Cal. App. Dec. 67, 192 Pac. 875.

4. Cook v. Miller, 175 Cal. 497, 166 Pac. 316 (violation of city ordinance held to be negligence per se); Peluso v. City Taxi Co., 41 Cal. App. 297, 182 Pac. 808; Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323.

5. Peluso v. City Taxi Co., 41 Cal. App. 297, 182 Pac. 808.

stead of the left, with a clear view of the situation, in violation of the Motor Vehicle Act, though to avoid a collision with the other automobile, he is guilty of negligence bordering on criminality. But the driver of a vehicle who overtakes another and gives warning of his desire to pass, but is prevented from safely passing to the left by the failure of the other driver to give way to the right, may thereupon lawfully pass to the right, though the law of the road as laid down by the Motor Vehicle Act of 1905, amended in 1907, requires vehicles overtaking others to pass to the left while those overtaken, as soon as practicable, give way to the right.[6]

Ordinances as affecting duty.—Under an ordinance requiring drivers to travel on all occasions on the right-hand side of the street, but in overtaking and passing other vehicles to pass to the left, an automobile driver approaching a standing street-car must keep to the right, and may not turn out to the left to avoid the car, street-cars not being "other vehicles" within the meaning of such an ordinance.[7] But an ordinance requiring use of the right-hand side of the street on all occasions when practicable does not absolutely prohibit the use of the left-hand side, and does not forbid turning out to the left to pass a preceding street-car, where the right-hand side is impassable. The ordinance, in such a case, does not compel the driver as a matter of law to follow the car, and whether he should do so or not is a question of fact.[8] It has been held that the driver of a motor truck is not guilty of contributory negligence in failing to turn out to the right to allow an automobile coming up from behind free way to pass, as required by ordinance, where the automobile approaches without warning, and the truck driver does not know of

6. Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323. See Stats. 1905, p. 816, § 4, subd. 1; Stats. 1907, pp. 916, 917.

7. Harris v. Johnson, 174 Cal. 55, Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 Pac. 1155.

8. Langford v. San Diego Elec. Ry. Co., 174 Cal. 729, 164 Pac. 398.

its presence till he sees it abreast of him on the left, when it is too late for him to turn out.[9]

Particular Places and Circumstances.

§ 129. In General.—Negligence in the operation of automobiles or motor vehicles generally is a relative term, which involves a consideration of many and ever-changing factors of time, place and circumstances. The increasing and complicated dangers of modern traffic on streets and highways must necessarily call for a corresponding advance in the measure of care which must be exercised by all who use them, whether motorist or pedestrian. Hence it is that these variant factors enter into a consideration of the duties and liabilities of motorists in any particular emergency. Certain dangers, such as those attendant upon the use of street intersections, railway crossings, etc., are made the subject of particular statutory enactments, and these will be considered in the paragraphs that follow.[10]

Improbable occurrences.—An electric power company, in building its power line along the edge of a public highway, owes the duty to the public to build it of such construction and in such manner that it will not menace travelers. But it is not called upon to anticipate unreasonable or improbable occurrences, as that an automobile will leave the highway and collide with one of its poles, and if it maintains the pole in ε condition to withstand the ordinary strains of weather and travel, and in a position to be safe from ordinary danger of collision, its duty is fulfilled, and it is not chargeable with negligence due to the breaking of the pole and consequent injury to

9. House v. Fry, 30 Cal. App. 157, 157 Pac. 500. See supra, § 120, as to colliding with buggy from behind. See infra, § 159, as to proximate cause.

10. See infra, §§ 133–140, as to highway and street intersections; and infra, §§ 141–156, as to railway crossings. See NEGLIGENCE.

an automobile passenger, because of a collision between it and the machine. Whether such a collision was one to be anticipated under all the circumstances is properly left to the jury to determine.[11]

§ 130. Barriers and Warning Lights.—It has been held that the violation of a municipal ordinance making it a misdemeanor for a contractor who has rendered a street dangerous not to erect barriers and maintain lights is negligence per se toward motorists.[12] And it is a rule that negligence in failing to place warning lights on obstructions in the highway cannot be excused by custom.[13] In order that an injured occupant of the automobile may recover for an injury caused by a contractor's failure to safeguard his work, it is only necessary to show, aside from ordinance requirements as to barriers and warning lights, that the pitfall was maintained without such safeguards, and that this negligence caused the injury. If the contractor would escape liability, he must successfully controvert the proof of negligence, or show that the injury was otherwise caused, as by contributory negligence.[14]

§ 131. On Defective Highways.—The reckless or unnecessary use of a defective highway, when the traveler knows or should know of its condition, is negligence precluding recovery for injuries.[15] Thus, one who, at night, needlessly selects a highway which he knows is torn up and in process of reconstruction, on a vague rumor that it could be used, though he knows of a safe road which travelers are warned to take, is guilty of contributory

11. Stewart v. San Joaquin L. & P. Co., 30 Cal. App. Dec. 303, 186 Pac. 160.

12. Martin v. Shea, 182 Cal. 130, 187 Pac. 23.

13. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398.

14. Martin v. Shea, 182 Cal. 130, 187 Pac. 23. See infra, § 163, as to proximate cause.

15. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398; Buckingham v. Commary-Peterson Co., 39 Cal. App. 154, 178 Pac. 318.

negligence.[16] And even when the defect is not known, there may still be negligence in the careless operation of the machine. Thus, one who drives an automobile in the dark, over a wet, oil-surfaced and unknown road, without lights, and with foot-brakes out of commission, is guilty of negligence contributing to a collision with an electric power company's pole at the side of the road.[17] But a motorcycle rider who travels at night, at a speed of twenty-five miles an hour, over an uncompleted road which has been, nevertheless, opened to partial traffic, along the edges of the paved portion of which crushed rock has been heaped without warning lights, is not guilty of negligence as a matter of law, though he may have previously known of the presence of the heaps of rock but forgot them in the sudden necessity of avoiding a collision with another vehicle.[18]

§ 132. Speed at Bridges.—Darkness sufficient to prevent an automobile driver from seeing across a bridge is an obstruction to vision within the meaning of the Motor Vehicle Act of 1913, which declares that no motor vehicle shall be operated at more than ten miles an hour where the driver's view of the road traffic is obstructed upon approaching an intersecting way, or crossing an intersection of ways, or in approaching or traversing a bridge, dam, trestle, causeway or viaduct, or in going around corners or curves in the highway.[19]

At Highway and Street Intersections.

§ 133. Care Required Generally.—The term "intersecting highway," defined by the Motor Vehicle Act as "any

16. Buckingham v. Commary-Peterson Co., 39 Cal. App. 154, 178 Pac. 318.

17. Stewart v. San Joaquin L. & P. Co., 30 Cal. App. Dec. 460, 186 Pac. 160.

18. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398. See supra, § 82, as to duty of passenger on dangerous road.

19. Ham v. Los Angeles County, 59 Cal. Dec. 474, 189 Pac. 462. See Stats. 1913, p. 649, § 22, subd. b.

highway which joins another at an angle, whether or not it crosses the other," means all space made by the junction of highways.[20] It applies to streets and highways running into each other, though they do not cross. And hence such a locality is within the provision of the act of 1915 limiting the speed of vehicles to ten miles an hour on approaching an intersecting way where the view of the road traffic is obstructed.[1] Thus, a highway approaching another at right angles but forking shortly before reaching it, one branch blending with the latter road in one direction and the other in the other, is an intersecting highway.[2] The standard of conduct imposed upon one approaching a railroad track, itself a warning of danger, is not applicable to the occupants of a vehicle approaching an intersecting street, there being nothing to suggest immediate danger, and the amount of vigilance necessary to constitute due care being correspondingly less.[3] The driver of a motor vehicle approaching a street or highway intersection and seeing an automobile coming on the cross-street has the right to assume that it will be so operated as not to collide with him.[4] Acting on this assumption, he would not be required to stop, or do anything else in particular to avoid a collision. Nor would he be guilty of negligence in not taking special precaution to avoid accident.[5] And where the approaching car continues its course without slackening speed and without sounding the horn or giving other warning, and in turning the corner precipitates a collision, the question of its driver's negligence is for the jury.[6] Whether the driver of an auto-

20. Stats. 1915, pp. 397, 409, § 22, subd. b.

1. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781; Muther v. Capps, 38 Cal. App. 721, 177 Pac. 882.

2. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

3. Oberholzer v. Hubbell, 36 Cal. App. 16, 171 Pac. 436.

4. Robinson v. Clemons, 31 Cal. App. Dec. 859, 190 Pac. 203; Christie v. McCall, 35 Cal. App. 546, 177 Pac. 507.

5. Robinson v. Clemons, 31 Cal. App. Dec. 859, 190 Pac. 203.

6. Christie v. McCall, 35 Cal. App. 546, 177 Pac. 507. See infra, § 160, as to proximate cause.

mobile entering a street intersection and hearing the gong of an approaching ambulance coming on the cross-street is negligent in stopping in the center of the intersection, instead of stopping as required by ordinance, is a question of fact for the jury.[7] And it has been held that whether an automobile driver who, as he approaches a street crossing, has his view cut off by a passing street-car, is guilty of negligence in going around the car instead of stopping, thus colliding with a pedestrian, will depend upon the size and weight of the machine, its speed, its noise, the condition of the streets, and other attendant circumstances.[8]

§ 134. Excessive Speed.—A motor vehicle driver approaching an intersection has the right to assume that another machine coming on the cross-street will not be operated at an excessive speed.[9] Speed which transcends the limits fixed by statute or ordinance is, of course excessive,[10] and constitutes negligence per se. Thus, approaching a street intersection at from thirty to thirty-five miles an hour, where an ordinance fixes twenty miles as the permissible limit on the city's streets, is negligence as a matter of law.[11] And approaching an intersection at a speed violative of law and without sounding a horn or giving other warning will sustain a finding of negligence.[12] It has been held that the fact that an automobile driver collided with a motorcycle rider after dark at a street in-

7. Newman v. E. E. Overholtzer Sons' Co., 59 Cal. Dec. 543, 190 Pac. 175.

8. Bellinger v. Hughes, 31 Cal. App. 464, 160 Pac. 838. See supra, §§ 110, 114, as to duty of pedestrians crossing in front of street-cars.

9. Robinson v. Clemons, 31 Cal. App. Dec. 859, 190 Pac. 203.

10. Kinney v. King, 32 Cal. App. Dec. 161, 190 Pac. 834; Scrogg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

11. Kinney v. King, 32 Cal. App. Dec. 161, 190 Pac. 834. See Newman v. E. E. Overholtzer Sons' Co., 59 Cal. Dec. 543, 190 Pac. 175 (holding it to be negligence to drive an ambulance, which is empty at the time and not answering a call, toward a street intersection in a city at a speed of from thirty-five to forty miles an hour).

12. Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

tersection through making a short left-hand turn into the intersecting street at a speed of fifteen miles an hour warrants a finding by the jury that his rate of speed was in itself negligence.[13] But the question of the negligence of an automobile driver in approaching an intersecting highway is, in general, one of fact to be determined on a consideration of all the surroundings.[14]

§ 135. Speed Where View is Obstructed.—The present Motor Vehicle Act prescribes a speed limit of fifteen miles an hour "in approaching or traversing an intersecting highway, or crossing or intersection of highways," where the driver's view of the road traffic is obstructed.[15] By the act of 1915, a speed of more than ten miles an hour was forbidden "when the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way or in traversing or crossing an intersection of ways," etc.[16] Violation of the statute is conclusive evidence of negligence;[17] and apart from the statute, high speed under such circumstances is negligence.[18]

Vehicles alone do not necessarily constitute an obstruction to the view within the meaning of the statute. Thus, three or four jitney buses turning out of the intersecting street would not amount to such an obstruction where, nevertheless, the driver could see the injured person plainly before the accident.[19]

§ 136. Control of Speed.—Some divergence of view is apparent in the decisions as to the precise distance from the intersection at which the speed prescribed by the stat-

13. Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40.

14. Robinson v. Clemons, 31 Cal. App. Dec. 859, 190 Pac. 203. See infra, § 160, as to proximate cause.

15. Motor Vehicle Act, § 22a, as amended in 1917 (see Deering's Gen. Laws, p. 1506).

16. Stats. 1915, p. 409, § 22, subd. b.

17. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

18. Cook v. Miller, 175 Cal. 497, 166 Pac. 316.

19. Muther v. Capps, 38 Cal. App. 721, 177 Pac. 882. See supra, § 132, as to darkness as an obstruction to view.

ute must be observed. On the one hand, it has been held that the statute means that the speed prescribed must be reached by the time the automobile reaches the point of intersection,[20] as it is not till then that danger from the cross-traffic arises. Hence a driver who is going at greater speed when twenty-five feet from the line of intersection, but who can bring his car to a complete stop within fifteen to thirty feet, cannot be said to be guilty of negligence as a matter of law, arising from a violation of the statute.[1] But it has also been held that the statute means that the driver, if he has been traveling at a speed greater than that prescribed, should reduce his speed to that limited at such a distance from the point of intersection as will enable him to so regulate or control his machine that, in case of the unexpected appearance of another machine from the intersecting way, he can the more readily avoid a collision.[2] The question of what this particular distance may be is one of fact for the jury to determine in each case, according to the particular circumstances, such as the kind of car being driven, its previous speed, its brake control, the character of the obstruction to the view, the general surrounding of the intersection, whether it is subject to heavy traffic, etc.[3]

§ 137. Right of Way and Speed in General.—An automobile driver approaching an intersection of ways is required by the Motor Vehicle Act to yield the right of way to vehicles approaching from his right. He is under legal obligation to so operate and control his car as to be able to do this. Obviously it is no excuse to say that he was going too fast to obey the law.[4] He must give the vehicle hav-

20. McPhee v. Lavin, 60 Cal. Dec. 31, 191 Pac. 23; Blackburn v. Marple, 29 Cal. App. Dec. 783, 184 Pac. 873.

1. McPhee v. Lavin, 60 Cal. Dec. 31, 191 Pac. 23.

2. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

3. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781; Blackburn v. Marple, 29 Cal. App. Dec. 783, 184 Pac. 875.

4. Kinney v. King, 32 Cal. App. Dec. 161, 190 Pac. 834 (holding that failure to give the right of way as required by law is negligence per se).

ing the right of way sufficient time to make the crossing.[5] Under the Motor Vehicle Act of 1913, which provides that vehicles approaching an intersecting road shall be under the control of the operator so as to permit vehicles on the right to have the right of way, a speed of from forty-three to sixty-four miles per hour has been held to be such as to place the machine operated by the defendant beyond the control required by the statute. Whereas, in the same case a speed of from twelve to fifteen miles per hour maintained by the plaintiff would not place his automobile beyond the control prescribed by the act.[6] In another case it was held to be negligence where the failure to yield the right of way was due to the negligent driver operating his machine at a speed of from thirty to thirty-five miles an hour.[7] However, the failure of an automobile driver to yield the right of way at an intersection does not necessarily constitute actionable negligence. His liability depends upon the particular circumstances, such as exigency occasioned by sudden peril, the observance of proper care by the driver claiming precedence, and so on.[8] And the question of the negligence of an automobile driver in failing to give another machine coming along the cross-road the right of way to which it is entitled is one of fact for the jury.[9] And this has been held to be the case even where the speed, just previous to reaching the intersection, was from twenty-five to thirty miles an hour.[10]

5. Maxwell v. Western Auto Stage Co., 31 Cal. App. Dec. 769, 189 Pac. 710.

6. Robinson v. Clemons, 31 Cal. App. Dec. 859, 190 Pac. 203.

7. Covel v. Price, 39 Cal. App. 646, 179 Pac. 540. And see Johnson v. Hendrick, 31 Cal. App. Dec. 47, 187 Pac. 782, for a holding that the physical circumstances of a collision showed negligence in not yielding the right of way.

8. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

9. Baker v. Western Auto Stage Co., 32 Cal. App. Dec. 651, 192 Pac. 73.

10. Maxwell v. Western Auto Stage Co., 31 Cal. App. Dec. 769, 189 Pac. 710.

§ 138. Rule Applied.—Assuming that the speed and relative positions of automobiles approaching an intersection of cross-streets are equal, the right of way, under the general rule, should be yielded to the vehicle approaching from the right,[11] and it is clear that the applicability of the right of way rule depends, in practice, upon the relative distance of the machines from the intersection. Accordingly, it has been held that an automobile driver is not obliged to yield the right of way to a motorcycle which is one hundred and forty-five feet away from the intersection. Under such circumstances the rule of the road announced under the Motor Vehicle Act is not applicable.[12] Nor is a motorcycle obliged to yield the right of way to an automobile which is so far away that, if its driver observes the speed law, the motorcycle will have an ample opportunity for safe passage.[13] Where the motor vehicles are traveling at such a rate of speed toward the intersection as would bring them in collision if both proceed along their respective lines of approach at their respective rates of speed, they must be deemed to approach the intersection simultaneously within the terms of a municipal ordinance requiring drivers to look out for and give the right of way to vehicles approaching simultaneously from their right at street intersections. And under such an ordinance, requiring drivers to "look out for" vehicles coming from the right, the fact that such a vehicle is coming at an illegal and excessive speed would intensify rather than diminish the duty to give it the right of way.[14] And yet it has been held that the rule of the right of way does not impose on a driver who is required to yield the right of way the duty of assuming that the other automobile will not slow down, in observance of the speed limits.[15] Ordinarily, the driver and occupant

11. See supra, § 137.

12. Ward v. Gildea, 30 Cal. App. Dec. 565, 186 Pac. 612.

13. Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679.

14. Kinney v. King, 32 Cal. App. Dec. 161, 190 Pac. 834.

15. Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679.

of a vehicle approaching a street intersection are not required to observe the progress of vehicles coming toward them from the left and over which they have the right of way, especially that of an automobile coming without warning, and they are not guilty of contributory negligence in not doing so. Particularly is this true where a collision is occasioned by the automobile crossing to the wrong side of the street.[16]

§ 139. Vehicles Following Each Other.—In discussing the somewhat unusual case of the right of way as applied to vehicles following each other in approaching an intersection, the court of appeal, speaking through Mr. Justice Hart, has said:

"Where two vehicles are traveling in the same direction on the same street, one in the rear of the other, it is the duty of the driver of the rear car to exercise reasonable care with respect to the forward car, and if the driver of the latter indicates by the proper signal his intention of turning to the left into another or cross-street, to yield to him that right . . . the driver of the rear car would certainly be guilty of the grossest negligence if he attempted to make the same time in such manner as to cut in on the forward car. The driver of the latter car would certainly have the right of way in such a case as between him and the driver of the rear car operating on the same street and in the same direction."[17]

§ 140. Turning at Intersections.—The failure of an automobile driver, in turning to the left into an intersecting street, to pass beyond and to the right of the center of the intersection before turning, as required by the Motor

16. Oberholzer v. Hubbell, 36 Cal. App. 16, 171 Pac. 436. But see Johnson v. Hendrick, 31 Cal. App. Dec. 47, 187 Pac. 782, for a holding that the physical circumstances of a collision at an intersection did not show negligence in driving on the wrong side of the street.

17. Barton v. Studebaker Corporation of America, 31 Cal. App. Dec. 905, 189 Pac. 1025. See 2 A. L. R., p. 1499, as to liability for injury to automobile while being backed.

Vehicle Act, constitutes negligence.[18] An automobile driver approaching a cross-road when the view is obstructed has the right to assume that another machine coming along the intersecting highway will, as required by the Motor Vehicle Act, pass to the right of the center of the intersection before turning to the left; but this does not give him the right to himself approach the intersection at an excessive speed in violation of the same statute.[19] Under the rule as to left-hand turns laid down by the Motor Vehicle Act, a driver who, in turning at an intersection, stops before reaching the intersection proper, and, leaving the public street, turns through an unused passage on private ground, emerging into the intersecting street without warning, is guilty of negligence.[20] But whether an automobile driver entering an intersecting highway from another road, which, forking a short distance away, enters the former road at an acute angle, was negligent in following this fork, thus being led into a short left-hand turn, instead of proceeding at right angles past the center of the intersection before turning to the left, a course which would have led him over an unpaved and sandy portion of the roadway, is a question for the jury; as is also the further question whether, had he taken the latter course, he would have avoided a collision with another machine coming at high speed from the left.[1]

A driver who, in making a left-hand turn at a street intersection, describes so large a semi-circle as to cause his machine to travel on the crossing commonly used

18. McPhee v. Lavin, 60 Cal. Dec. 31, 191 Pac. 23; Perez v. Hartman, 39 Cal. App. 601, 179 Pac. 706; Cook v. Miller, 175 Cal. 497, 166 Pac. 316. And see Blackburn v. Marple, 29 Cal. App. Dec. 761, 184 Pac. 873, for a holding that collision was due, under the evidence, to improper left-hand turn instead of inevitable accident.

19. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

20. Martinelli v. Bond, 29 Cal. App. Dec. 239, 183 Pac. 463.

1. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781. See, also, Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460, for a holding that negligence in making a short left-hand turn was a question for the jury.

by pedestrians, and who, without warning signal, thus collides with a pedestrian from behind, is guilty of negligence.[2] And he is liable for negligence if, while violating the speed limit fixed by municipal ordinance, he makes a broad right-hand turn in entering an intersecting street, which carries him to the wrong side of the roadway, where he collides with a motorcycle.[3] An automobile driver, suddenly confronted at a street intersection by another machine which has made a short, left-hand turn and is in consequence on the wrong side of the roadway, is not guilty of negligence as a matter of law because, in an effort to avoid a collision, he himself turns toward the wrong side of the street and increases his speed. Nor is the driver whose improper turning of the corner occasioned the danger in a position to complain of the other driver's efforts to avoid the threatened accident.[4]

At Railway Crossings.

Street Railways.

§ 141. In General.—An automobile driver is not guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. All he is required to do is to exercise ordinary care in the use of his senses of sight and hearing to observe oncoming cars; and it is not negligence to attempt to cross in front of a car if it is at such a distance that an ordinarily prudent person would believe it safe to do so, though it may afterward appear that a different course would have been safe. Nor is the rule altered by the fact that the lawful speed fixed for street-cars at the locality is twenty miles an hour instead of a less speed, it being merely incumbent on the

2. Kuhns v. Marshall, 30 Cal. App. Dec. 730, 186 Pac. 632. See supra, §§ 102, 103, as to negligence toward pedestrians at street intersections.

3. Hirst v. Morris & Co., 31 Cal. App. Dec. 105, 187 Pac. 770.

4. McPhee v. Lavin, 60 Cal. Dec. 31, 191 Pac. 23.

automobile driver to take the greater speed into account in forming his judgment. The greater speed allowed does not make it negligence to try to cross at all. While it may be presumed that street railway men in charge of a car will observe the speed limit, an automobile driver may not rely on this presumption to the extent of crossing blindly in front of a moving car. Yet if he observes the car and honestly concludes that it is in fact coming at a lawful speed, he may supplement his judgment thus formed by the presumption in question, and is not necessarily negligent if he acts in the conclusion thus reached.[5] But it is the duty of the driver of an automobile, on approaching a street-car crossing, to give way to an approaching car, if necessary to avoid a collision, since he can do so while the car cannot.[6] The failure of the driver of an automobile to look and listen before attempting to cross the tracks of a street railway company at a street intersection in a city is not negligence as a matter of law, but, at most, a question to be determined by the jury. A railroad company operating a gasoline motor car over its tracks in a street where it has no exclusive right, is a street railway company within this rule.[7]

§ 142. Duty of Street-car Companies.—It is the common-law duty of those in charge of a train of cars, when approaching a public crossing, to give notice of the approach by all reasonable warnings, such as blowing a whistle, ringing a bell, signal lights, or such other devices as may be sufficient to give timely warning to travelers so all may have time to stop in safety; and this duty exists though there is no statute or ordinance requiring it.[8] But

5. Commonwealth Bonding & C. Ins. Co. v. Pacific Electric Ry. Co., 29 Cal. App. Dec. 492, 184 Pac. 29.

6. Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 Pac. 798. See supra, §§ 84, 86, as to duty of passenger in automobile in approaching tracks; and supra, § 21, as to duty toward street-cars moving in same direction.

7. Bidwell v. Los Angeles etc. Ry. Co., 169 Cal. 780, 148 Pac. 197.

8. Lininger v. San Francisco etc.

under the well-settled rule that the law does not require a higher degree of care of motormen operating street-cars than is required of other users of the public streets, and that the care required must be measured by all the rights and circumstances of the particular case, a motorman is not obliged to take extra precautions to avoid accident merely because he sees an automobile approaching the tracks, but may rest on the assumption that the automobile will be so operated as to avoid accident until the contrary is apparent.[9] In the absence of any legal speed limit applying to street-cars, a street-car company has the right to propel its cars at any rate it sees fit consistent with ordinary care.[10]

§ 143. Instances of Motorist's Negligence.—When an automobile driver approaching a street-car crossing saw an oncoming street-car while he still had ample time either to stop or to avoid it by turning aside, but after apparent attempts to turn undertook to cross the tracks and was killed, it was held that he was guilty of contributory negligence.[11] But in a case where a driver going eight or ten miles an hour did not discover an approaching street-car traveling eleven or twelve miles an hour until he was within seven feet of the corner, his machine being then twenty-five or thirty feet from the tracks, and who tried to cross because he feared his new tires would not hold if he tried to stop, has been held not negligent, within the rule that imminent peril excuses imprudence.[12] And when a driver approaching a street railway crossing at from ten to fifteen miles an hour looks in both direc-

R. R. Co., 18 Cal. App. 411, 123 Pac. 235. See RAILROADS; STREET RAILWAYS.

9. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119. See infra, §§ 164, 166, as to last clear chance doctrine.

10. Cook v. Los Angeles Ry. Corp., 169 Cal. 113, 145 Pac. 1013. See STREET RAILWAYS.

11. Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 Pac. 798.

12. Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235.

tions but sees and hears nothing until his machine enters the cross-street, when, before he can stop and while he is traveling twenty-six feet, a street-car, at first a block away but coming at a furious speed greatly in excess of the legal limit reaches the spot, strikes the automobile, and runs three hundred feet before it can be stopped, the claim that there was contributory negligence as a matter of law on the part of the driver of the automobile was held not only unfounded, but so frivolous as to warrant the imposition of a penalty for prosecuting a frivolous appeal on that ground.[13] In general, the question as to whether one is guilty of contributory negligence in attempting to cross the tracks in front of an approaching street-car is for the jury to determine.[14] And, likewise, the question as to whether one's acts render him free from negligence, is not determinable as a matter of law, but is for the jury to find as a question of fact.[15]

§ 144. Instances of Street-car Company's Negligence.— Where an ordinance limits the speed of street-cars to eight miles an hour, but a street-car company's schedule calls for eleven miles or more, and its car approached the street intersection at this pace without ringing a bell or giving other warning, it has been held that there is sufficient evidence of negligence to require the denial of a motion for a nonsuit.[16] And in a case where the plaintiff's automobile was struck by a motor car running backward on the defendant railway company's tracks, the evidence given was held sufficient to sustain a verdict, finding that the accident was due to the railway company's negligence.[17] In gen-

13. Levings v. Pacific Electric R. Co., 178 Cal. 231, 173 Pac. 87.

14. Commonwealth Bonding & C. Ins. Co. v. Pacific Electric Ry. Co., 29 Cal. App. Dec. 492, 184 Pac. 29.

15. Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 Pac. 319 (as to whether speed was excessive); Carlton v. Pacific Electric Ry. Co., 39 Cal. App. 321, 178 Pac. 869 (as to whether efforts to avert collision with car rendered one free from negligence).

16. Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235.

17. Bidwell v. Los Angeles etc. Ry. Co., 169 Cal. 780, 148 Pac. 197.

eral, the question of a motorman's negligence in operating his car at an excessive speed, or in failing to properly slacken speed, is for the jury.[18]

Interurban Railways.

§ 145. Duty of Motorist at Interurban Crossings.— One about to cross the tracks of an electric interurban railway at a street intersection in a city is not held to that high degree of care required in the case of an ordinary steam railroad running through the country. The care required is such as is reasonable under all the circumstances,—such as people of ordinarily prudent habits could reasonably be expected to exercise.[19] Where, however, the electric interurban railway is operated under conditions similar to those surrounding the operation of steam railroads, the same rule applies. The track itself is a sign of danger, and the automobile driver is bound to exercise his faculties to ascertain whether a train is approaching.[20] The rule applies to a driver from whom an approaching train is hidden by one which has just passed. The motorist has no right to omit any precautions which the law demands, nor may he rely on compliance by the railway company's servants with the speed laws.[1] And he must exercise reasonable care to have his machine under control.[2] Where it is plain from the physical facts estab-

18. Burr v. United Railroads, 163 Cal. 663, 126 Pac. 873 (where automobile was stalled at a railroad crossing and was run upon by a motorman, although he was repeatedly signaled to stop).

19. Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 Pac. 53.

20. Griswold v. Pacific Electric Ry. Co., 30 Cal. App. Dec. 922, 187 Pac. 65; Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34; Christman v. Southern Pac. Co., 38 Cal. App. 196, 175 Pac. 808 (the same rule is applicable as to the approach of gasoline motor cars at interurban crossings); Jones v. Southern Pac. Co., 34 Cal. App. 629, 168 Pac. 586; Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 Pac. 16. See supra, §§ 84, 86, as to duty of passenger in automobile in approaching tracks.

1. Griswold v. Pacific Electric Ry. Co., 30 Cal. App. Dec. 922, 187 Pac. 65. See infra, § 150.

2. Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 Pac. 16.

lished that by looking and listening, the plaintiff must have observed the approach of the train, the fact that he testified that he looked for the approaching train but did not see it until he was on the track will not suffice to absolve him of contributory negligence.[3]

The present Motor Vehicle Act allows a speed of fifteen miles an hour on approaching railway tracks even where the view is obstructed, unless the obstruction prevents a view of the crossing itself, or of traffic within four hundred feet of it, where the prescribed speed is ten miles per hour.[4] It has been held that, in the absence of special circumstances, it is not negligence for the driver of an automobile to approach the crossing of an electric railway at a speed of six miles an hour.[5]

§ 146. Motorist's Negligence Per Se.—Where the physical facts shown by undisputed evidence raise the inevitable inference that the person approaching a railroad crossing did not look or listen, or that having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train that was plainly open to his view, he is as a matter of law guilty of contributory negligence.[6] The rule is that where the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard, under the circumstances shown, he is not entitled to have his case go to the jury.[7]

Rule applied.—The rule above stated has been applied where the driver had a clear view of the tracks for a thousand feet after he came within sixty feet of the crossing, since, if no train was visible, he would have had ample time to cross, and if one was in sight, he was negligent in

3. Jones v. Southern Pac. Co., 34 Cal. App. 629, 168 Pac. 586.

4. Christman v. Southern Pacific Co., 38 Cal. App. 196, 175 Pac. 808.

5. Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 Pac. 53.

6. Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 Pac. 16; Jones v. Southern Pac. Co., 34 Cal. App. 629, 168 Pac. 586.

7. Jones v. Southern Pac. Co., 34 Cal. App. 629, 163 Pac. 586.

failing to observe it, or in trying to cross in front of it, or in traveling so fast he could not stop.[8] It has also been applied where he could see the tracks for a number of blocks from the time he came within thirty feet of the crossing.[9] So, too, the driver of a motor vehicle who approaches a railroad crossing which he knows to be regularly in use, at a rate of speed so great that, as he knows, his machine will inevitably go upon the tracks after his first unobstructed opportunity to look for oncoming trains, is guilty of contributory negligence as a matter of law.[10] An automobile driver, about to cross four parallel tracks of an electric interurban railway, all of which are in constant use to his knowledge, whose view as he reaches the first track is obstructed by a train which has just passed, who hears a warning gong announcing the presence of a train but believes it caused by one standing on the fourth track, and who then proceeds across the intervening tracks without again looking for the approach of trains, though, had he looked, he could have seen one coming on the third track in time to have stopped his machine, is guilty of contributory negligence as a matter of law. The rule that one about to cross railway tracks must not omit any precaution, nor rely on the railway's observance of speed law, applies with special force to such a case.[11]

§ 147. Instances of Freedom from Negligence Per Se.— It cannot be said as a matter of law that an automobile driver approaching an electric railway crossing where his view is almost wholly obstructed by a row of trees and underbrush, in addition to the obstruction afforded by the line trolley poles, is guilty of contributory negligence in not seeing an approaching train.[12] Likewise, it has been

8. Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 Pac. 16.

9. Jones v. Southern Pac. Co., 34 Cal. App. 629, 168 Pac. 586.

10. Christman v. Southern Pacific Co., 38 Cal. App. 196, 175 Pac. 808.

11. Griswold v. Pacific Electric Ry. Co., 30 Cal. App. Dec. 922, 187 Pac. 65.

12. Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 Pac. 16.

held that a driver who, on almost coming to a stop, on approaching an interurban electric railway crossing, looks and listens but fails to see a train, is not guilty of lack of proper care as a matter of law, since the question as to the care exercised is one on which reasonable men might differ.[13] And it has been held that a motorist is not guilty of negligence as a matter of law in increasing his speed in order to get safely over, both under the imminent peril rule and because it is not clear that this was not his only chance of escape.[14] In a case where, on approaching a crossing, a driver slowed down and looked, but saw nothing, his vision being obstructed by trolley poles, and who looked again when on the first track and saw a train four hundred feet away coming sixty feet a second, and who then tried to stop but failed to do so within the remaining three-foot margin of safety, it was held that he was not guilty of contributory negligence as a matter of law in not bringing his automobile to a stop in time to avert a collision, though a machine of the type used and going at the same rate of speed might have been stopped within three or four feet.[15]

§ 148. Duty of Interurban Electric Railway Companies. The duty of taking added precautions to avert a collision is not cast upon a motorman by the mere fact that he sees an automobile approaching a highway crossing. It is essential, too, that he shall see it to be in a position of danger. He has the right to assume that it will stop before coming to the track, and a realization of danger would arise only where it appears, either that the automobile is being driven in ignorance or disregard of the possibility of meeting an approaching car, or that it has got so near the track that it cannot be stopped in time to avert a collision. Thus, a motorman seeing an automobile which in

13. Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34.

14. Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 Pac. 53.

15. Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34.

approaching a crossing along a highway checks its speed when fifty feet away is justified in believing that it will stop to let him pass, and is not required to take special precautions to avoid a collision until he knows the contrary.[16] It cannot be said as a matter of law that an electric railway company is free from negligence toward the driver and occupants of an automobile endeavoring to cross its tracks at a much used street intersection where its train approached the crossing at a speed of forty miles an hour, though the train was being operated over the company's private right of way, where there was no device at the crossing to give warning of approaching trains, where the company's trolley poles, as well as a small station, were so placed as to partially obscure the tracks, and where no whistle or bell was sounded until the train was within two hundred and fifty feet of the automobile, then already on the tracks.[17] It has been held that whether an electric railway train traveling at a speed of thirty miles an hour over a highway crossing, where it encounters an automobile, was going at an excessive rate of speed is a question for the jury.[18]

Steam Railroads.

§ 149. Duty of Motorist at Steam Railroad Crossing in General.—While the driver of an automobile approaching a railroad crossing and those in charge of a train are both bound to use care appropriate to the circumstances to avoid a collision, the precautions required of one are, from the nature of the case, different from those required of the other.[19] A steam railway track over which trains are con-

16. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709. See infra, § 166, as to last-clear chance doctrine.

17. Tousley v. Pacific Electric Ry. Co., 166 Cal. 457, 137 Pac. 31; Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34.

18. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

19. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709.

stantly operated is itself a warning of danger, and hence, it is in general the duty of a driver, on approaching a steam railroad crossing, to stop, look and listen for the approach of a train.[20] He is bound to look and listen and, if necessary, stop even without knowing that a train is coming, and this obligation is increased rather than diminished when he is aware of the presence of a train.[1] However, the rule that an operator of a vehicle must stop, look and listen on approaching a steam railroad track is not absolute, but depends on the special circumstances of the case, as, for instance, whether he knows of the presence of the track, and whether there is a point of safety from which observation can be effectively made.[2] Thus, he need not stop if he can see as well without stopping.[3] And it cannot be said as a matter of law that a stranger traveling upon a highway over which, unknown to him, a railway track crosses, is, by reason of his failure to stop, look and listen, guilty of negligence, where the railway track is obscured and there is nothing to indicate its presence or warn him of its existence. And so it has been held that a passenger in an automobile who, with the driver, is unfamiliar with the locality, is not chargeable with contributory negligence because the automobile is stopped on a railroad crossing of which, being covered with mud, they were unaware until they reached it, and there being no train then in sight, and where later their automobile is struck by a train approaching around a curve before they can again start their machine.[4]

20. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36; Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, L. R. A. 1916A, 842, 151 Pac. 282; Walker v. Southern Pac. Co., 38 Cal. App. 377, 176 Pac. 175. See RAILROADS.

1. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36.

2. Whitney v. Northwestern Pac. R. Co., 39 Cal. App. 139, 178 Pac. 326.

3. Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

4. McClure v. Southern Pac. Co., 41 Cal. App. 652, 183 Pac. 248. See supra, §§ 84, 86, as to duty of passenger in automobile on approaching tracks.

§ 150. Reliance on Performance of Duty by Train Crew. It is not the law in California that a person approaching a railroad crossing is authorized to assume that persons operating a train will not in any way be negligent in that operation. Such a rule, it has been said, would abrogate the doctrine of contributory negligence.[5] Notwithstanding any such negligence, the motorist is charged with notice of the hazard and risk which he assumes in crossing the tracks, and hence is bound to use his faculties to ascertain the approach of a train, and to determine from its speed and distance whether it is reasonably prudent to attempt to cross ahead of it.[6] Reliance on the train crew's performance of duty will not relieve him of the necessity of looking if he does not hear, and stopping if he cannot see.[7] He cannot rely on a custom or even the legal duty of the train crew to sound bell or whistle or display lights;[8] but must have his machine under such control that even in the absence of these warnings he will still be able to stop in time to avoid danger.[9]

§ 151. Duty When View is Obstructed in General.—The Motor Vehicle Act (section 22) fixes a maximum speed limit of fifteen miles an hour for motorists approaching railway crossings when the view is obstructed, and if the obstruction hides the crossing, or the rail traffic within four hundred feet of it, the highest speed allowed is ten

5. Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, L. R. A. 1916A, 842, 151 Pac. 282; Walker v. Southern Pac. Co., 38 Cal. App. 377, 176 Pac. 175; Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 Pac. 1117; Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21; Eddlemon v. Southern Pac. Co., 41 Cal. App. 340, 182 Pac. 811.

6. Walker v. Southern Pac. Co., 38 Cal. App. 377, 176 Pac. 175.

7. Eddlemon v. Southern Pac. Co., 41 Cal. App. 340, 182 Pac. 811.

8. Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, L. R. A. 1916A, 842, 151 Pac. 282; Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 Pac. 1117; Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

9. Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 Pac. 1117 (where an instruction to the contrary of the rule stated in the text was held erroneous).

miles per hour. The motorist, where his view is thus obstructed, must exercise increased diligence in the use of his remaining faculties, in order to measure up to the standard of ordinary care.[10] It is his duty to stop, look and listen at some point, where such conduct will be effective. Common prudence must at times dictate that he bring his machine to a full stop before attempting the crossing. It is true that the rule, as has been pointed out, is not absolute; where the view is unobstructed and he can ascertain the approach of a train quite as well without stopping, it would be idle to require him to stop. But he must avail himself of vision, and where the view is obstructed, must place himself in a position where he can use his faculties of observation to advantage.[11] In conformity to these rules, it is held to be contributory negligence for a motorist, whose view is obstructed, to cross a railroad track without stopping for purposes of observation;[12] as where he cannot see along the track till he is almost upon it;[13] or where, driving a noisy automobile toward a familiar and dangerous crossing, where the view is obstructed, he fails to stop, or silence the engine, and listen. Such conduct is negligence as a matter of law.[14]

§ 152. Selecting Point for Observation.—It is the duty of a traveler on a public highway approaching a railroad crossing to use ordinary care in securing a time and place to stop, look and listen for coming trains.[15] He is not required to do this at absolutely the most advantageous place, for this would not only put on him the burden of knowing the most advantageous point, but of exercising

10. Rayhill v. Southern Pac. Co., 35 Cal. App. 231, 169 Pac. 718.

11. Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

12. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36; Rayhill v. Southern Pac. Co., 35 Cal. App. 231, 169 Pac. 718; Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

13. Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

14. Rayhill v. Southern Pac. Co., 35 Cal. App. 231, 169 Pac. 718.

15. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407. See RAILROADS.

the highest care, when all that is required of him is ordinary care.[16] Nevertheless, it is his duty to stop, look and listen at some point where such conduct will be effective.[17] And if there exists a point, as shown, for instance, by the admitted physical facts, when by looking and listening he must have become aware of an oncoming train, he will be guilty of contributory negligence as a matter of law if he attempts to cross without stopping at that point.[18] Thus, the driver of an automobile approaching a steam railroad track where his view is obstructed, but who nevertheless has a space of seventeen feet before reaching the track within which to stop and make a satisfactory observation, is guilty of contributory negligence as a matter of law in not doing so, although, at the rate of speed at which he was traveling, the space of seventeen feet was covered in a fraction of a second.[19] And under the rule above stated a motorcycle rider approaching a steam railroad crossing where his view of the main line is obstructed by a line of cars standing on a switch-track and projecting into the street, but who would have a clear view of the main track upon passing the end of this line of cars, while still some thirteen feet from the main line, is under the legal duty of looking at that point before going on to the main line. And he is not relieved of this duty of looking and listening, and stopping if necessary, by any negligence of the company in allowing the line of cars to stand there.[20]

16. Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 Pac. 1117.

17. Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

18. Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, L. R. A. 1916A, 842, 151 Pac. 282; Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 Pac. 1117 (holding that, notwithstanding the general rule, a motorist is not negligent in not stopping to discover a line of flat-cars standing still and disconnected near a crossing at night; without lights upon them, and where there was not sufficient moonlight to disclose them).

19. Eddlemon v. Southern Pac. Co., 41 Cal. App. 340, 182 Pac. 811.

20. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36.

§ 153. Duty to Leave Machine in Order to Look.—It is the established rule in California that a motorist, on coming to a railroad crossing where his view is obstructed, is under no absolute legal obligation to leave his machine and go forward on foot for purposes of observation,[1] unless, under the facts, where his view is obstructed, he could not otherwise see an approaching engine,[2] or unless, as the limitation has been otherwise expressed: "To exercise due care, under the situation as revealed by him, the consensus of the opinion of prudent men would require him, if necessary to ascertain whether his life was in danger, to get out of his machine and go forward a few feet on foot in order that the matter might be placed beyond peradventure."[3] It would seem, therefore, from these various views, that while the duty of going forward on foot is not absolute in all cases of obstructed view, there may be special circumstances which would impose it. An instructive case, illustrating this distinction, is that of a driver, familiar with the crossing, whose view was so obstructed by a building that he could not see more than fifteen or eighteen feet along the track without advancing his machine within the danger zone. He was held guilty of contributory negligence as a matter of law in contenting himself with this

1. Whitney v. Northwestern Pac. R. Co., 39 Cal. App. 139, 178 Pac. 326.

2. Murray v. Southern Pac. Co., 177 Cal. 1, 169 Pac. 675 (Angellotti, C. J., in his concurring opinion, dissents, however, on the point stated in the text, and says that the question whether the defendant acted as a reasonably prudent man was for the jury). And see dissenting opinion of Chief Justice Angellotti, in Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, L. R. A. 1916A, 842, 151 Pac. 282, where it is said: Unless the situation be such, "in view of all the circumstances, as to enable the court to say as a matter of law that it was essential to the exercise of reasonable care on his part that any such inspection on foot should be made. No such precaution has ever been declared essential in this state as to the driver of a vehicle about to cross a railroad track. To the contrary, the decisions in this state are uniformly to the effect that the obligation to look up and down the track is only enjoined when by observation from the vehicle, the approaching train could be detected."

3. Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21 (per Burnett, J.).

restricted view, and in proceeding on to the track without stopping, alighting, going forward on foot, or otherwise informing himself of possible danger.[4]

§ 154. Instances of Motorist's Negligence in General.— The driver of an automobile who, on approaching a steam railroad track, stopped seventy-five feet away, got out, and observed the track for eight hundred or a thousand feet, and hearing no bell or whistle, re-entered his machine and proceeded toward the crossing without again looking, cannot be said as a matter of law to have been guilty of contributory negligence preventing his recovery for injuries from a collision with a train which would not have reached him in the twelve or fifteen seconds intervening after his observation, but for its excessive speed. The question in such a case is for the jury.[5] One who, at twilight, approached railroad tracks, driving his automobile at a reasonable rate of speed, and before attempting to cross, stopped, looked and listened, but saw only some standing cars which somewhat obstructed his view, and who then attempted to cross when he was struck by a freight-car coming upon him suddenly without signal or lights, cannot be held guilty of contributory negligence as a matter of law.[6] And the question whether the driver of an automobile who, on ascending a hill along a winding road where his view of a railroad track at the top of the acclivity is obstructed, does not stop his machine to look and listen, is one of fact for the jury, where its determination involves several inferences of fact to be drawn from conflicting evidence, namely, whether the driver, who was killed in the resultant collision, knew of the presence of the railroad track, whether there was any point short of dangerous proximity to the track where he could have seen

4. Murray v. Southern Pacific Co., 177 Cal. 1, 169 Pac. 675.

5. Walker v. Southern Pac. Co., 38 Cal. App. 377, 176 Pac. 175.

6. Firth v. Southern Pac. Co., 30 Cal. App. Dec. 681, 186 Pac. 815.

the approaching train if he had stopped, and whether he could have heard the train's approach.[7]

§ 155. Crossing in Front of Train.—A chauffeur who attempts to cross a railroad track in front of a moving railroad car, of the approach of which he has had a clear view for several hundred feet, is guilty of negligence.[8] And it is negligence in a motorcycle rider to cross a steam railroad line in front of a train he knows to be approaching a short distance away, even though he does not know that the engine is pushing cars in front of it, and therefore that the cars are closer than he supposes.[9] But it has been held that the driver of an automobile who, on approaching a railroad crossing, sees cars standing on the tracks, motionless and apparently disconnected from any engine, is not required as a matter of law to surmise that they may be suddenly shunted backward over the crossing without notice, by an engine concealed by the cars and the curve of the track.[10]

§ 156. Negligence of Railroad Company.—The mere fact that the motorman in charge of a gasoline motor car operated on an ordinary railroad failed to give warning of the car's approach to a highway crossing where it struck an automobile is itself sufficient to sustain a finding of negligence.[11] Until a motorcycle rider approaching a steam railroad crossing reaches a point where he can no longer escape injury from an oncoming train by the exercise of ordinary care, the train crew have a right to rely upon his

7. Whitney v. Northwestern Pac. R. Co., 39 Cal. App. 139, 178 Pac. 326 (in denying a hearing in the supreme court in this case, the tribunal declined to express any opinion on the question of contributory negligence, 57 Cal. Dec. 169).

8. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709.

9. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36.

10. Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 Pac. 1117.

11. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709. See supra, §§ 141, 145, as to steam railroad's operation of gasoline motor car.

continuing obligation to observe the train's approach and avoid the danger.[12] A railroad company whose train is backed around a curve and upon a street crossing where it collides with an automobile, without bell or whistle being sounded as required by statute, and without air brake attached, and where the trainman, whose duty it is to transmit signals to the engineer, who is out of view of the crossing, fails to do so, is guilty of negligence.[13] The fact that the driver of an automobile is familiar with a railroad crossing where the view of approaching trains is so obstructed as to create a dangerous situation, while a factor in determining the question of contributory negligence, has no bearing on the question of the railroad company's initial negligence in switching cars over the crossing, at night, without attendants, lights or warning.[14]

PROXIMATE CAUSE.

§ 157. Rule Generally.—It is a general rule that while the operation of an automobile in violation of a statute or ordinance constitutes negligence per se, nevertheless such negligence, however illegal, furnishes no ground of complaint to another until it becomes a contributing cause of injury to him.[15] The rule that negligence must be the proximate cause of injury, however, does not require demonstration of the causal connection. It is not neces-

12. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36. See infra, § 163, as to proximate cause; and infra, §§ 164, 166, as to "last-clear chance" doctrine.

13. McClure v. Southern Pac. Co., 41 Cal. App. 652, 183 Pac. 248.

14. Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 Pac. 1117. See infra, § 176, as to effect of finding exonerating train crew of negligence on question of company's liability.

15. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398; Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37; Henderson v. Northam, 176 Cal. 493, 168 Pac. 1045; Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323; George v. McManus, 27 Cal. App. 414, 150 Pac. 73; Baillargeon v. Myers, 27 Cal. App. 187, 149 Pac. 378; Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109; Fenn v. Clark, 11 Cal. App. 79, 103 Pac. 944. See NEGLIGENCE.

sary to produce an eye-witness to testify directly thereto. The connection may be made by circumstantial evidence in the same way that any other fact is proved.[16] Violation of the speed limit by the driver of an automobile involved in an ensuing accident does not create a conclusive, or any, presumption that such negligence was the proximate cause of the catastrophe. The question of proximate cause remains to be determined by the jury from all the facts and circumstances of the case.[17] The jury may find that the contributory negligence of the person injured was the efficient and proximate cause of the injury.[18] But where an automobile running without lights after dark, in violation of an ordinance, strikes and injures a pedestrian, it will be assumed, in the absence of evidence to the contrary, that the pedestrian possessed the sense of sight and might have seen the automobile had lights been displayed, and thus have avoided the accident.[19] And where an automobile is operated on the wrong side of the street down to the instant of collision, which would not have occurred otherwise, and where no intervening cause exists to break the causal connection, it cannot be said as a matter of law that no such connection has been established.[20] While it is true that the negligence of the driver of a motor vehicle may not be imputed to a passenger under a plea of contributory negligence, yet if the driver's negligence was the proximate cause of injury, the passenger cannot recover against a third party.[1]

§ 158. Injuries to Pedestrians.—The negligence of an automobile driver in traveling along a city street at forty miles an hour has been held to be the proximate cause of

16. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398.

17. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

18. Davis v. John Breuner Co., 167 Cal. 683, 140 Pac. 586.

19. Fenn v. Clark, 11 Cal. App. 79, 103 Pac. 944.

20. Baillargeon v. Myers, 27 Cal. App. 187, 149 Pac. 378.

1. Hagenah v. Bidwell, 31 Cal. App. Dec. 765, 189 Pac. 799.

a collision with a pedestrian who was struck after the machine had skidded fifty feet in an unsuccessful attempt to stop in time to avoid the collision; for, had the machine been traveling at a reasonable speed, it could have been more easily controlled and the pedestrian would have passed the point of collision before it reached there.[2] Evidence that an automobile was being driven twenty-five to thirty miles an hour after dark, without lights, along a street, that the driver was holding the steering-wheel with but one hand and looking to one side, and that he thus struck a pedestrian, whom he dragged fifteen or twenty feet, has been held to sustain a finding that the driver's negligence was the proximate cause of injury.[3] The act of an automobile driver in leaving his machine standing unattended on a street-car track along which, as he knows, street-cars frequently pass, is the direct and proximate cause of injury to a bystander, himself free from negligence, against whom the automobile is hurled by a street-car which collides with it, through the negligence of the street-car operatives. The negligence of the street-car crew in such a case does not break the causal connection between the act of the automobile driver, in itself highly negligent, and the injury to the bystander.[4]

§ 159. Passing Other Vehicles.—A finding that the act of the driver of an automobile in traveling over a familiar highway but forty-five feet wide, after dark, and on the left-hand side thereof, was the proximate cause of a collision with a buggy coming from the opposite direction and which hugged the right-hand side to avoid the accident, has been held to be warranted.[5] And it has been held that the negligence of an automobile driver seeking to pass a

2. Ellis v. Sanberg, 41 Cal. App. 506, 182 Pac. 792.

3. Meier v. Wagner, 27 Cal. App. 579, 150 Pac. 797. See supra, § 157, as to presumptions establishing proximate cause.

4. Keiper v. Pacific Gas & Electric Co., 36 Cal. App. 362, 172 Pac. 180. See infra, § 164, as to last-clear chance doctrine.

5. Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319.

motor truck and having a clear way before him, in turning into the truck's path before getting sufficiently ahead of it to clear it, is the sole effective and proximate cause of the collision. This is true though the truck was not kept reasonably near the right-hand curb, as required by ordinance. The fact that the automobile had ample space to pass on the left and a clear way before it compels the conclusion that the truck driver's violation of the ordinance was not the proximate cause.[6] Precisely the same holding was made in the case of a motor-truck driver who sought to pass a steam roller, and turned again into its path before getting clear of it, thus injuring a helper riding on the steam roller. In this case both parties were violating the Motor Vehicle Act, the truck driver in turning in so soon, and the driver of the roller in not keeping close to the right-hand curb, in which way he might have avoided the accident.[7]

§ 160. Collisions at Street Intersections in General.— Driving an ambulance, which is empty at the time and not answering a call, toward a city street intersection at a speed of from thirty-five to forty miles an hour, where it collides with an automobile entering the intersection from the cross-street at a speed of six miles an hour and which stops, as required by ordinance, on hearing the ambulance gong, is the proximate cause of the accident. In such a case, whether the act of the automobile driver in stopping, as required by ordinance, but doing so in the center of the intersection, proximately contributed to the ensuing collision, is a question of fact for the jury.[8] The fact that a chauffeur operates his machine on the left-hand side of the street in violation of a city ordinance, where it collides with a bicycle rider turning in from an intersecting street,

6. House v. Fry, 30 Cal. App. 157, 157 Pac. 500.

7. Moreno v. Los Angeles Transfer Co., 30 Cal. App. Dec. 696, 186 Pac. 800.

8. Newman v. E. E. Overholtzer Sons' Co., 59 Cal. Dec. 543, 190 Pac. 175.

which it would not have done had it been on the right-hand side where it belonged, makes the chauffeur's negligence in this particular the proximate cause of injury, the connection between the violation of the ordinance and the accident being unbroken by any efficient intervening cause.[9] But the negligence of a motorcycle rider in proceeding across an intersecting street on the left-hand side of the street he is traveling cannot be held to be the proximate cause of injuries which he sustains in a collision with an automobile coming up the intersecting street on his right-hand side.[10]

§ 161. Failure to Give Right of Way.—The act of an automobile driver who approached an intersecting way at a speed in excess of forty-three miles an hour, when he collided with another machine coming on the cross-road at a speed of from twelve to fifteen miles an hour, and to which he should have given the right of way, was held to have been the proximate cause of a collision between them.[11] But where the negligent violation by a plaintiff of an ordinance requiring him, at a street intersection, to give the right of way to another automobile approaching from his right, proximately contributes to an ensuing collision in which he was injured, he cannot recover for the injury, although the other machine was being driven at an illegal speed.[12]

§ 162. Short Left-hand Turns.—Where a collision between an automobile and a motorcycle occurred only because each was at the time in the negligent violation of a city traffic ordinance, the automobile in making a short left-hand turn into an intersecting street, and the motor-

9. Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37.

10. Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679. See supra, § 157, as to presumptions and proof as to speed and use of wrong side of highway constituting proximate cause.

11. Robinson v. Clemons, 31 Cal. App. Dec. 859, 190 Pac. 203.

12. Kinney v. King, 32 Cal. App. Dec. 161, 190 Pac. 834.

cycle in turning out to the right to pass a laundry wagon which is preceding it, and where the accident would not have happened had either driver obeyed the law, the contributory negligence of the rider of the motorcycle precludes his recovery for injuries.[13] And when a collision between a motorcycle and an automobile, both approaching a street intersection from opposite directions, would not have occurred if the automobile driver, before seeking to turn to the left into the intersecting street, had passed beyond and to the right of the center of the intersection as required by section 20 of the Motor Vehicle Act, instead of making a short turn to the left, thus intersecting the motorcycle's line of travel, the fact that the motorcycle rider, in an effort to avoid the accident, swerved to the right, so that the collision actually occurred upon the intersecting street, a number of feet beyond the curb line of the street in which he had been traveling, does not relieve the automobile driver from liability on the theory that his negligence is thus shown not to have been the proximate cause of injury.[14] But the negligence of an automobile driver in making a short left-hand turn into an intersecting street in violation of the Motor Vehicle Act, will not prevent his recovery for injuries in a collision with another machine occurring further along in the intersecting street and after he had reached a position on its right-hand side where he was lawfully entitled to be, such negligence not contributing to the accident.[15]

§ 163. Accidents on Defective Highway and at Railroad Crossing.—Evidence that a motorcycle rider riding at night over an uncompleted highway, along the edge of the paved portion of which crushed rock had been heaped

13. Cook v. Miller, 175 Cal. 497, 166 Pac. 316.

14. Perez v. Hartman, 39 Cal. App. 601, 179 Pac. 706.

15. Wilkinson v. Rohrer, 32 Cal. App. Dec. 155, 190 Pac. 650.

without warning lights, encountered a buggy, that his motorcycle turned to the right and left a track through the crushed rock for a hundred feet when it overturned, that the rider's dead body lay a few feet beyond, and that the broken foot-plate and pedal from the left-hand side of the machine were found near where it had skidded or slipped in the rock, sustains a finding that the failure to place warning lights on the pile of rock was the proximate cause of the rider's death. The reasonable inferences in such case, from the evidence, are that the rider sought to avoid the collision, that he did not knowingly run into the rock pile, that had lights been properly placed on it he would have seen it, and that his death was caused by the skidding of his machine on the rock.[16] Where an automobile driver, who stopped for observation before crossing steam railroad tracks, was unable to see a gasoline motor car being operated on the tracks because its distance placed it beyond the line of visibility, but its illegal speed brought it to the crossing in time for a collision, a finding that the illegal speed was the proximate cause of the accident has been held justified.[17]

§ 164. Rule as to "Last Clear Chance," in General.— The "last clear chance" doctrine declares that one who sees another negligently assume a position of peril of which he is unconscious or from which he cannot extricate himself, but who nevertheless fails to exercise ordinary care to avoid injuring him, is liable notwithstanding the other's initial negligence.[18] The effect of the doctrine is to eliminate from consideration all question as to the proximate cause of the perilous situation of the person injured, for under the doctrine his contributory negligence ceases

16. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398.

17. Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030.

18. Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 Pac. 798. And cases cited infra. See, also, NEGLIGENCE.

to be a factor in determining liability as soon as the situation demands the application of the rule.[19]

Strictly considered, the doctrine can be invoked only in favor of the person injured.[20] The doctrine necessarily implies contributory negligence in the injured party.[1] Assuming initial contributory negligence on the part of the injured person, however, the doctrine then declares that it was the negligence of the other party that was the proximate and efficient cause of the damage, because, having a clear opportunity of avoiding the accident by the exercise of ordinary care, he nevertheless willfully and recklessly disregarded the duty which the circumstances cast upon him.[2] Thus, if a motorman has actual knowledge of the peril of the occupants of an automobile approaching the street-car tracks, and has a clear opportunity to avoid an accident by the exercise of ordinary care, but negligently fails to do so, this failure becomes a proximate cause of injury.[3] But there must be a clear opportunity to avoid the accident by the exercise of ordinary care, and where no such opportunity is presented, then the doctrine obviously does not apply.[4] And under the rule, the peril to

19. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36; Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119.

20. Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 Pac. 342.

1. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781; Keiper v. Pacific Gas & Electric Co., 36 Cal. App. 362, 172 Pac. 180 (holding that the rule cannot be applied to free from liability an automobile driver who leaves his machine standing on a street-car track, where it is struck by a street-car and projected against a bystander to the latter's injury, the injured person being himself free from negligence, even though the street-car crew must have seen the automobile in time to have avoided colliding with it).

2. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781. See infra, § 184, as to disregard of last-clear chance, alleged as willful injury.

3. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119.

4. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781 (holding that it is very doubtful if the rule applies to a case where but two seconds of time intervene between the discovery by each other of two approaching automobiles and the ensuing collision); Mayer v. Anderson, 36 Cal. App. 740, 173 Pac. 174.

the plaintiff which throws upon the defendant the burden of preventing the accident must be such as the plaintiff can no longer escape by the exercise of ordinary care.[5]

§ 165. Rule Applied.—The last clear chance doctrine has been held to have no application to the case of an auto truck driver and a bicycle rider approaching each other in plain view, and where each holds unyieldingly to his course until a collision is effected. Nor could it apply to the truck driver in such a case if he was proceeding on the proper side of the street, in plain view of the bicycle rider, whose path of advance would leave eight or ten feet clearance between the vehicles.[6] And in a case where a collision between automobiles occurred due to one driver persistently turning to the left, while the other as persistently turns to the right in an effort to avoid it, it has been held that this affords no occasion for the application of the last clear chance doctrine to either party.[7] Conceding that the doctrine of the last clear chance applies to the case of two automobiles approaching each other, where but two seconds of time intervened between the discovery of each by the other and the ensuing collision, a matter which is doubtful, the question whether the defendant, in attempting to avoid the accident by swerving to the left, did not comply with the requirements of the doctrine, is one for the jury.[8] But the last clear chance doctrine applies to a case where a pedestrian, halted by a street-car and standing in the middle of the street, is seen by an automobile driver in time to stop his machine and avoid striking the former, but, negligently

5. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36 (holding that the doctrine cannot apply to the case of a motorcycle rider approaching a steam railroad crossing, so as to require action by the crew of an incoming train, until the rider's position is such that ordinary care on his part will no longer save him).

6. Konig v. Lyon, 33 Cal. App. Dec. 67, 192 Pac. 875.

7. Blackburn v. Marple, 29 Cal. App. Dec. 761, 184 Pac. 873.

8. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

fails to do so; and it has been held that the rule applies though, in such a case, the pedestrian was negligent in not watching for vehicles as he stood in the exposed position.[9] That an injured party was himself negligent, will not defeat a recovery against the driver of an automobile who collided with him from behind, if such driver saw the former's position and realized the danger, but nevertheless failed to swerve from his course to avoid the collision, as he might have done.[10]

§ 166. Defendant's Knowledge of Plaintiff's Peril.— The last clear chance rule does not apply where the defendant was not aware of the plaintiff's danger, and this is the rule though he should have been aware of the danger.[11] Hence, it is incumbent on a plaintiff seeking to recover under the doctrine to establish actual knowledge of his perilous position on the part of the defendant. Knowledge by defendant of facts from which a reasonable man would infer peril is not enough. It has been said that a single sentence in a supreme court opinion supporting the opposite view must be held, in view of later decisions, to have been inadvertently used.[12] This rule that the defendant's knowledge of plaintiff's danger must be actual, not merely implied or inferential or a duty imposed by law, has been most frequently applied in cases of motorists' approach to railway crossings.[13]

9. Nussbaum v. Traung Label etc. Co., 31 Cal. App. Dec. 778, 189 Pac. 728.

10. Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58.

11. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36; Griswold v. Pacific Electric Ry. Co., 30 Cal. App. Dec. 922, 187 Pac. 65; Collins v. Marsh, 176 Cal. 639, 169 Pac. 389; Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119; Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709; Lobbett & Dean v. Oakland etc. Ry., 36 Cal. App. 641, 172 Pac. 1123; Quackenbush v. Los Angeles Ry. Corp., 28 Cal. App. 173, 151 Pac. 755. See infra, § 240, as to instructions.

12. Lobbett & Dean v. Oakland etc. Ry., 36 Cal. App. 641, 172 Pac. 1123 (referring to the Arnold v. San Francisco-Oakland Terminal Rys., 175 Cal. 1, 164 Pac. 798).

13. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36; Griswold v. Pacific Electric Ry. Co.,

Thus, where a motor truck approaching an interurban railway slowed down, thereby leading the motorman of an oncoming electric car to believe that it was going to stop and allow him to pass, whereupon, though having his car under control and its speed moderated, he again accelerated it, and the truck, also resuming its progress, was struck by the car, the last clear chance doctrine was held not to apply in favor of the owner of the truck, since it was not shown that the mortorman had actual knowledge of the truck's peril.[14] The doctrine does not apply in favor of the driver of an automobile approaching a street-car crossing until his negligence has brought him so close to the track that he cannot by ordinary care stop or turn aside to avoid a collision with an oncoming car, or until his conduct shows that he intends to hazard a crossing, for until then the motorman has the right to assume that the driver will discharge his legal duty of giving way to the car to avoid an accident, and if at or before the moment when the doctrine becomes applicable the motorman does all he can to stop his car, he cannot be held culpable.[15] But a street-car motorman approaching a street intersection at a high speed, who sees a motor truck attempting to cross the track, may be in a position, in view of his intimate knowledge of his own speed, to discover the truck's peril before its occupants are themselves aware of it, and by diligence avoid a collision, and hence the last clear chance doctrine is properly applied to the case in the instructions of the court.[16] Where a pedestrian crossing a city street on which there is heavy traffic does not look to either side, but remains

30 Cal. App. Dec. 922, 187 Pac. 65; Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119; Quackenbush v. Los Angeles Ry. Corp., 28 Cal. App. 173, 151 Pac. 755.

14. Lobbett & Dean v. Oakland etc. Ry., 36 Cal. App. 641, 172 Pac. 1123.

15. Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 Pac. 798; Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709.

16. Commonwealth Bonding & C. Ins. Co. v. Pacific Electric Ry. Co., 29 Cal. App. Dec. 492, 184 Pac. 29.

entirely oblivious of approaching vehicles, the fact that the driver of an automobile saw him in time to have avoided a collision does not make the last clear chance doctrine applicable, since the driver had no reason to suppose that the pedestrian would continue his course until he had placed himself in a position of danger.[17]

ACTIONS.

In General.

§ 167. Parties.—One who is injured by the concurring negligence of two persons can sue either or both, and it is no defense that the particular person sued was not himself the sole tort-feasor.[18] Thus, if a passenger in an automobile is injured by its collision with a railroad motor car because of the joint negligence of the railroad company and the driver of the automobile, he may recover against both.[19] And where one standing in the street is injured by an automobile hurled against him by a street-car, both the street-car company and the automobile owner who negligently left it standing on the street-car tracks are joint tort-feasors. Both are liable, and may be proceeded against either separately or jointly.[20] But an employer whom it is sought to charge with his employee's negligence under the doctrine of respondeat superior is not a joint tort-feasor with the employee, so that either or both may be sued.[1].

§ 168. Examination of Jurors.—A juror, summoned in a suit for damages against an automobile driver for col-

17. Mayer v. Anderson, 36 Cal. App. 740, 173 Pac. 174.

18. King v. San Diego Electric Ry. Co., 176 Cal. 266, 168 Pac. 131.

19. Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030.

20. Keiper v. Pacific Gas & Electric Co., 36 Cal. App. 362, 172 Pac. 180.

1. Fimple v. Southern Pac. Co., 38 Cal. App. 727, 177 Pac. 871. See MASTER AND SERVANT.

liding with a wagon, who states on his voir dire that he has no prejudice against the use of automobiles on public highways, is not subject to challenge for cause, because he admits having had a telephone conversation with another prospective juror in which the latter said he did not think automobiles had any more right on the road than a wagon, nor because a witness testified to having overheard a telephone conversation between prospective jurors whose identity he did not know in which one said that automobile drivers who ran into wagons ought to be prosecuted.[2] The action of the court, on the trial of a pedestrian's action for injuries from being struck by an automobile, in examining the jurors collectively as to whether they knew anything about the accident, or had read or heard of it, whether they knew the parties or their attorneys, whether any of them or their families had been injured by a moving automobile, and whether any of them knew of any reason disqualifying him as a juror, liberality being also shown counsel in allowing examination of the jurors on these and other matters, is not error.[3] It has been held that any error in the action of counsel, under pretense of ascertaining whether prospective jurors were interested in insurance companies furnishing insurance to jitney bus drivers to indemnify against accidents, in informing the jurors that defendant was so insured, is cured where the court, on calling attention to its prejudicial character, secures a statement from the jurors that they would disregard the information. And it has been held that such an error is waived where defendant consents to impanel the jury from the talesmen then in attendance.[4]

§ 169. Questions Put by the Court.—In an action for damages from a collision between automobiles on a

2. Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

3. Owens v. W. J. Burt Motor Car Co., 30 Cal. App. Dec. 767, 186 Pac. 821.

4. Baldarachi v. Leach, 30 Cal. App. Dec. 742, 186 Pac. 1060.

bridge it is proper for the court to ask a witness whether his estimate as to the point on the bridge where the accident occurred was based on actual measurement, or whether he was "just guessing at it," if the query is so propounded as not to appear to discredit the witness.[5] And it has been held not an improper expression of opinion on the merits by the trial judge to ask a witness who had testified that there was nothing to prevent the plaintiff from so changing his position as to escape injury, whether he himself would like to ride in the way the plaintiff was riding.[6]

§ 170. Inspection of Vehicle by Jurors.—Permitting the jury to view a buggy injured in a collision with an automobile, about a year after the accident, is not error where witnesses testify that its condition is unchanged.[7] But in a case where fifteen months had elapsed since a collision between an automobile and a buggy, during which the automobile has been used and had made several long trips, it has been held that the court properly refused to allow an inspection of the machine by the jury to determine what injuries it may have sustained in the collision. When the nature and extent of injuries to an automobile from a collision are testified to in detail by a witness whose evidence is neither disputed nor contradicted, any error in refusing to allow the jury to inspect the machine is without prejudice.[8] In a case where the motorcycle on which plaintiff was riding at the time of a collision with an automobile was examined by jurors during a recess of court and before the motorcycle had been introduced in evidence, and in ascertaining, as they believed, that the testimony of plaintiff's wife that she could see the speedometer from her seat on the rear of the motor-

5. Grover v. Morrison, 32 Cal. App. Dec. 273, 190 Pac. 1078.

6. Moreno v. Los Angeles Transfer Co., 30 Cal. App. Dec. 696, 186 Pac. 800.

7. Freiburg v. Israel, 30 Cal. App. Dec. 961, 187 Pac. 130. See TRIAL.

8. Oberholzer v. Hubbell, 36 Cal. App. 16, 171 Pac. 436.

cycle was false, it has been held that the jurors were guilty of improperly receiving evidence out of court without the knowledge of the litigants, thereby preventing plaintiff from showing by evidence that the position of the speedometer had been altered by the collision.[9]

§ 171. Verdict.—In an action by one injured in an automobile collision against the owners of both machines as codefendants, it is not prejudicial to submit to the jury but three forms of verdict,—one against each defendant and one against both,—where the record is such that a verdict in favor of both defendants could not have been sustained.[10] A directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. It is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one.[11]

A verdict for the plaintiff implies that he was free from contributory negligence.[12] But where, in an action for damages resulting from a collision of two automobiles, both parties seek affirmative relief, plaintiff on his complaint and defendant by way of cross-complaint, a verdict against both implies that the accident was due to the contemporaneous negligence of both.[13] The verdict of the jury is conclusive, both as to the existence of negligence and its effect as contributing proximately to the injury, unless a contrary conclusion necessarily follows from undisputed facts.[14]

9. Tunmore v. Macleish, 31 Cal. App. Dec. 2, 187 Pac. 443.

10. Blackwell v. American Film Co., 32 Cal. App. Dec. 937, 192 Pac. 189.

11. Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109. See TRIAL.

12. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

13. Grover v. Morrison, 32 Cal. App. Dec. 273, 190 Pac. 1078.

14. King v. Green, 7 Cal. App. 473, 94 Pac. 777.

§ 172. Necessity for Special Findings.—Where negligence as to the operation of an automobile is alleged in general terms, it is sufficient if the finding on the issue is equally general, and specific findings as to acts done or omitted are not necessary.[15] And in an action by a passenger against an auto stage company for injuries due to the negligence of its driver in colliding with another machine, if no issue is presented in the pleadings as to the possible negligence of the driver of the latter car, it is unnecessary for the court to find respecting his negligence, a finding which follows the allegations of the complaint being sufficient to sustain the judgment.[16] But where in an action for damages from the collision of two automobiles the answer alleges contributory negligence, and there is evidence sufficient, if believed by the court or jury, to sustain the plea, it is error for the court to fail to find on the issue.[17] And where in an action by a motorcycle rider for injuries resulting from a collision with an automobile, the defendant alleges contributory negligence in that the motorcycle rider was traveling at an unlawful rate of speed, and evidence pro and con is introduced as to this circumstance, the defendant is entitled to have a specific finding made upon that issue.[18] In an action for injuries to a passenger in a motorcycle from collision with an automobile, it has been held that it is not an abuse of discretion to refuse to submit special questions to the jury as to which side of the street the accident occurred on, the speed of the vehicles, and whether the motorcycle struck the automobile.[19]

§ 173. Sufficiency of Findings.—Findings that plaintiff's injuries were caused "solely by the negligence"

15. Todd v. Orcutt, 29 Cal. App. Dec. 572, 183 Pac. 963.

16. Baker v. Western Auto Stage Co., 32 Cal. App. Dec. 651, 192 Pac. 73.

17. Maxwell v. Western Auto Stage Co., 31 Cal. App. Dec. 769, 189 Pac. 710.

18. Huntington v. Vavra, 36 Cal. App. 352, 172 Pac. 166.

19. Wiley v. Young, 178 Cal. 681, 174 Pac. 316.

of the defendant, automobile owner, and that the plaintiff was walking from her automobile when an automobile operated by codefendant "did carelessly and negligently collide" with her, etc., have been held to be sufficient as a finding of negligence.[20] And a finding that the negligence of an automobile driver in striking a pedestrian was the proximate and sole cause of injury sufficiently covers, in general, the defense of contributory negligence.[1] But in an action where the defense of contributory negligence was set up, findings that the plaintiff, a motorcycle rider, was unable to avoid the collision, and that the acts of the defendant were the direct and proximate cause of the injuries, do not, it has been held, amount to an adverse determination of the issue of contributory negligence, since both are consistent with an unlawful rate of speed on the motorcycle rider's part.[2] In an action to recover damages against an automobile driver for colliding with a person on foot who had dismounted from another car, and where the defendant pleaded in defense that his view was impeded by the lights from a third machine falling on his windshield, that he endeavored to peer through the lower part of it, that on discovering plaintiff thirty feet from her machine he endeavored to stop, intending to offer aid, but was too late to avoid striking her, has been held sufficiently negatived by findings that the collision occurred fifteen feet farther on, and that defendant should have looked around his windshield.[3]

§ 174. Inconsistent Findings.—Where the court makes specific findings, as well as general, the findings are to be read as a whole, and, if possible, so interpreted as to

20. Webster v. Motor Parcel Delivery Co., 41 Cal. App. 657, 183 Pac. 220.

1. Woodhead v. Wilkinson, 181 Cal. 599, 10 A. L. R. 291, 185 Pac. 851.

2. Huntington v. Vavra, 36 Cal. App. 352, 172 Pac. 166.

3. Woodhead v. Wilkinson, 181 Cal. 599, 10 A. L. R. 291, 185 Pac. 851.

uphold the judgment; and only an irreconcilable conflict between the general and special findings will require a reversal. Thus, where the court found that the defendant was operating his automobile to the north of the center of a street while traveling easterly, though the Motor Vehicle Act requires the driver of an automobile to travel on the right-hand side of the street "wherever practicable," but also found that defendant was free from negligence, without finding as to the practicability of the south side of the street as a place of travel, it has been held that there is no such irreconcilable conflict in the findings as would invalidate the judgment.[4] And a special finding by the jury that a passenger in an automobile could, if he had looked, have seen an oncoming locomotive in the interval of five seconds of unobstructed view accorded him before the automobile reached the railroad tracks, is not inconsistent with a general finding of freedom from contributory negligence, nor does it necessarily compel the conclusion that he did not look.[5] And in an action for injuries to a motorcycle rider from a collision with an automobile, findings of the jury that the act of defendant in making a short left-hand turn into an intersecting street was the proximate cause of the accident, and that his traveling at fifteen miles an hour was the proximate cause, are not inconsistent, as the collision might have been occasioned by both circumstances operating concurrently.[6] But a finding that the driver of a motor truck was negligent in not giving a person in the street warning of its approach, has been held to be inconsistent with a further finding that such person was negligent in not heeding the warning given by the noise and movement of the truck. And a finding that the driver of a motor truck was negligent in backing it so

4. Todd v. Orcutt, 29 Cal. App. Dec. 572, 183 Pac. 963.

5. Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405. See supra, § 173, as to findings consistent with plaintiff's unlawful speed not amounting to determination of that issue.

6. Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40.

that it "collided violently with the plaintiff" has been held inconsistent with another finding that plaintiff rode his tricycle into the street and against the truck. The ultimate conclusion that the plaintiff was guilty of contributory negligence cannot be sustained on such inconsistent findings as to the probative facts.[7]

§ 175. Effect of Findings Unsupported by Evidence.—Where in an action against the driver of an automobile for injuries plaintiff's evidence shows that the driver was negligent as a matter of law, the latter cannot object that an inference of fact to that effect in the court's findings is unwarranted.[8] Where the driver of a motor truck approaching an electric railway crossing is negligent in not having the truck under control, a finding that he could have avoided a collision with an electric car by turning in one direction or the other in a line parallel to the tracks, has been held to be immaterial.[9] Though a special finding that a passenger in an automobile who was killed in a collision with a railroad locomotive was doing certain acts for his own safety be disregarded as not supported by the evidence, a verdict for damages for his death is not thereby overthrown, where it is supported by the other findings based on the presumption that he was exercising ordinary care.[10]

§ 176. Findings Exonerating Servant of Negligence—Effect of.—Unless an employer personally participated in his employee's negligence, or was guilty of some independent act of negligence of his own which contributed to the injury, he cannot be held liable where the employee

7. Zechiel v. Los Angeles Gas & E. Co., 60 Cal. Dec. 356, 192 Pac. 720.

8. King v. Green, 7 Cal. App. 473, 94 Pac. 777.

9. Lobbett & Dean v. Oakland etc. Ry., 36 Cal. App. 641, 172 Pac. 1123.

10. Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405. See infra, §§ 212-219, as to sufficiency of evidence to support finding.

himself has been found blameless.[11] Thus, in an action for the death of an automobile driver killed while crossing a railroad track through the alleged negligence of the company's engineer, a verdict in favor of the engineer necessarily discharges the railroad company, unless it was guilty of an independent act of negligence proximately occasioning the accident. And it has been held that the fact that the fireman failed to ring a bell or sound the whistle would not constitute a separate act of negligence on the company's part, distinct from the negligence of the engineer, when the engine was in charge of the engineer, and the fireman was under his orders.[12] And where the driver of an automobile which collides with a railroad train alleges negligence in the train crew in failing to sound the whistle and ring the bell on approaching the crossing, and makes them parties defendant along with the railroad company, and the verdict of the jury acquits the train crew of liability, the company, as their principal, is also exonerated. And this is so, although negligence is also alleged against the company in allowing its right of way to become so overgrown with vegetation as to obstruct the view, it appearing that notwithstanding such obstruction, the plaintiff, by his own averment, would have known of the train's approach had the proper signals been given.[13] If a person injured is guilty of contributory negligence, so that the driver of the automobile which injured him is freed from liability, the negligence of the driver becomes an immaterial question, not only as to himself, but also as to his employer, who is equally exonerated by the fact of the contributory negligence.[14]

11. Fimple v. Southern Pac. Co., 38 Cal. App. 727, 177 Pac. 871; Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

12. Fimple v. Southern Pac. Co., 38 Cal. App. 727, 177 Pac. 871.

13. Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

14. Davis v. John Breuner Co., 167 Cal. 683, 140 Pac. 586.

§ 177. **New Trial.**—An existing traffic ordinance which comes to a party's knowledge after trial is not newly discovered evidence, upon which a motion for a new trial can be founded.[15] Whether the improper conduct of two jurors in examining out of court, during a recess, the motorcycle on which plaintiff had been riding at the time of a collision, in order to test the credibility of one of plaintiff's witnesses who was thus deprived of an opportunity to explain any improbability in her testimony, was sufficient to necessitate a new trial, was a question peculiarly within the discretion of the trial court, and an order granting a new trial for such misconduct should not be disturbed on appeal.[16]

§ 178. **Grounds for Reversal on Appeal in General.**—The ruling of the trial court as to whether a given state of facts present before it does or does not amount to negligence as a matter of law will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion.[17] Where on an appeal by a street-car company from a judgment against it for injuries resulting from the collision of its car with an automobile it appears that an erroneous instruction was rendered prejudicial by evidence to which it applied, and the evidence was such as to leave responsibility for the accident in great doubt, so that the appellate court could not say that, if the instruction had not been given, the jury ought, nevertheless, to have found for plaintiffs, nor, after a careful review of the evidence, that the jury, under proper instructions, would have returned a verdict for plaintiff, it has been held that the court cannot disregard the error, even under the liberal provisions of the constitution,

15. Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 Pac. 1059.

16. Tunmore v. Macleish, 31 Cal. App. Dec. 2, 187 Pac. 443. See NEW TRIAL.

17. Spring v. Tawra, 33 Cal. App. Dec. 37, 192 Pac. 1051. See supra, § 177, as to review on appeal of trial court's discretion in granting new trial. See APPEAL AND ERROR, vol. 2, p. 918 et seq.

that no judgment shall be set aside or new trial granted for misdirection of the jury, etc., unless, after examining the entire cause, the court shall be of the opinion that there was a miscarriage of justice.[18] Where in an action for personal injuries resulting from a collision between plaintiff's wagon and defendant's automobile, the trial court gave an instruction embodying the doctrine of res ipsa loquitur, and the evidence is not before the appellate court, it will be presumed on appeal that the evidence was such as to justify the instruction.[19]

§ 179. Verdict or Findings Based on Conflicting Evidence.—The usual rule that verdicts based on conflicting evidence will not be reviewed on appeal if there is any rational basis for the jury's conclusion, applies to actions for damages for negligence in the operation of motor vehicles.[20] And in considering as a question of law the relative negligence of plaintiff and defendant, and the conduct of either or both as contributing to the injury, an appellate court will assume that the jury took any view of the facts, justified by the evidence, which tends to support the verdict, and the same rule holds good as to the findings of fact by the court where a jury is waived.[1] Thus, where the evidence as to whether an automobile was being operated on the left-hand side of the street at the time of accident in violation of an ordinance, and whether traffic conditions justified such operation, is conflicting, the court on appeal will assume, in support of a judgment for plaintiff, that the jury found that the ma-

18. Langford v. San Diego Elec. Ry. Co., 174 Cal. 729, 164 Pac. 398.

19. Onele v. Chappell, 38 Cal. App. 375, 176 Pac. 370.

20. Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679. See Brimberry v. Dudfield Lumber Co., 60 Cal. Dec. 150, 191 Pac. 894, for instance of findings of negligence and freedom from contributory negligence in a collision between an automobile and motorcycle, based on conflicting evidence, not disturbed on appeal. See supra, § 143, for instance of frivolous appeal on ground of contributory negligence of motorist struck by street-car.

1. King v. Green, 7 Cal. App. 473, 94 Pac. 777.

chine was so operated without justification.[2] And where the jury were properly instructed on proximate cause, and the theories of the respective parties as to the occurrence of the accident, the plaintiff's theory being that it was due to defendant driving his auto truck on the wrong side of the street and holding on his course without warning of his intention to do so, the court will presume on appeal that by a verdict for plaintiff the jury determined that such negligence was the proximate cause of the ensuing collision.[3] But in an action to recover for injuries due to a collision of two automobiles founded on the theory of willful injury, it cannot be assumed that, because an instruction on inevitable accident was given, the verdict for the defendants was based upon a finding as to such fact, the evidence as to willful injury, negligence and contributory negligence being conflicting and the instructions involving an absolute contradiction between the two theories of negligence and willful injury.[4]

§ 180. Failure to Incorporate Map in Record.—If a map or plat of the location of an automobile collision, used by the witnesses in their testimony, is not incorporated in the record on appeal, so that much of the testimony remains meaningless to the appellate court, and it appears that some evidence tended to support the jury's finding as to negligence, and that this evidence might, in the light of the plat, clearly have justified it, the court will assume that it did so.[5] Where in an action for injuries resulting from the collision of automobiles at a street intersection the court draws a line on a map introduced in evidence, and the map is not before the supreme court on appeal, but the instructions show that the court told the jury that the line was not intended to be accurate but was drawn only for purposes of illustration, an

2. Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37.

3. Konig v. Lyon, 33 Cal. App. Dec. 67, 192 Pac. 875.

4. Tognazzini v. Freeman, 18 Cal. App. 468, 123 Pac. 540.

5. Dilger v. Whittier, 33 Cal. App. 15, 164 Pac. 49.

objection to the court's act will not be considered on appeal.[6]

§ 181. Reversal for Conflict With Physical Facts.—The general rules which guide appellate courts in reversing judgments rendered in motor vehicle accident cases, because irreconcilable with the physical facts of the case, have been thus set forth by Justice Finlayson of the court of appeal:

"An appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal. . . . It cannot be laid down as a rule of law that a plaintiff in a personal injury case cannot recover unless the court can see that every detail of the accident, as testified to by the plaintiff and his witnesses, is consistent with admitted physical facts and the laws of science. Undoubtedly, where some of the details of an accident, as described by a witness, conflict with admitted physical facts, the whole story of the accident, as given by that witness, may be entirely discredited; but, as an appellate court, we cannot reverse unless we can say that the admitted physical facts are wholly irreconcilable with the negligence alleged in the complaint."[7]

§ 182. Application of Rule.—Where the jury accept the statement of a pedestrian, that the machine was running without lights, as against a mechanical demonstration that it was so constructed that its lights went out when it stopped, a circumstance which might have deceived the pedestrian into thinking there were no lights, the court on appeal is not in a position to say that the jury were wrong.[8] Where the chief conflict in the evidence, in an

6. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713.

7. Austin v. Newton, 31 Cal. App. Dec. 734, 189 Pac. 471. See infra, § 182, for application of rule.

8. Mauchle v. Panama-Pacific International Exposition Co., 37 Cal. App. 715, 174 Pac. 400.

action by a motorcycle rider, for damages against an automobile driver, was whether the automobile driver coming up behind the motorcycle as it was traveling fifteen or twenty miles an hour, crowded it into the ditch, or whether the motorcycle came up behind the automobile at a much higher speed and ran into the ditch in endeavoring to pass on the wrong side of the automobile, the other circumstances of the accident being practically uncontroverted, the fact that the motorcycle rider was hurled from his machine and over a wall, is not so inconsistent with the theory of the lesser rate of speed, as to require a reversal of a judgment for him on the theory that it is inconsistent with the physical facts of the case.[9] In an action for injuries to a motorcycle rider from a collision with an automobile at a street intersection, the court of appeal will not attempt a solution of the problem in physics presented by the motorcycle rider's testimony that he was going but three miles an hour at the moment of impact, and the contrasted fact that the fender of the automobile back of the right front wheel was bent, the footboard forced to the rear, bending some of its attachments until the rear mudguard rested against and completely blocked the rear wheel, and the throttle rod bent so as to force open the throttle and cause the automobile to jump forward rapidly for half a block, as most of the damage may have been caused by this after movement. Hence the plaintiff's testimony that the two vehicles reached the intersection at the same time will not be rejected as unbelievable and insufficient to support the judgment, in favor of the opposite theory that the motorcycle was one hundred and forty-five feet away when the automobile arrived at the intersection, and reached it in time to effect the collision only by traveling at high speed.[10]

9. Austin v. Newton, 31 Cal. App. Dec. 734, 189 Pac. 471.

10. Ward v. Gildea, 30 Cal. App. Dec. 565, 186 Pac. 612.

Pleading.

§ 183. Allegations of Negligence in General.—A complaint for damages for injuries resulting from a collision of an electric railway train at a highway crossing with an automobile in which plaintiff was a passenger, which alleges that defendant negligently ran its train at a great and negligent rate of speed across the highway without sounding any alarm and without warning, states a case of negligence. It is not proper to set out the circumstances of the accident in detail, for that would be pleading evidential facts.[11] In an action against a railroad company for the death of an automobile driver struck by a train at a crossing through the alleged negligence of the engineer in running at a careless speed without warning signal, an allegation that the locomotive was operated at a high and careless speed notwithstanding the crossing "was concealed from view by buildings and box-cars along the side of said crossing, which said building and box-cars obstructed the view thereof by the persons in charge of said locomotive," does not constitute an allegation of a separate and distinct act of negligence on the part of the company in maintaining the buildings and box-cars, apart from the negligent operation of the locomotive by the engineer, so as to sustain a verdict against the company, though the engineer, who was a codefendant, was acquitted of liability. Nor can such a verdict be sustained on the theory that it was the duty of the fireman, who was not made a party defendant, to ring the bell and blow the whistle, where the complaint contains no allegation of negligence on the fireman's part and does not attempt to charge the company with any act or omission of his.[12]

11. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

12. Fimple v. Southern Pac. Co., 38 Cal. App. 727, 177 Pac. 871. See supra, § 176, as to effect of finding that servant was not negligent on liability of master.

§ 184. Negligent or Willful Injury.—An allegation in a complaint for personal injuries from an automobile that the defendant "so unskillfully, carelessly and negligently and recklessly" ran the machine that it "was driven wantonly and maliciously" at a speed in excess of twenty miles an hour upon the plaintiff, does not make the gravamen of plaintiff's case wantonness and malice due to driving at the excessive speed, but the essence of the charge is that the defendant so unskillfully and negligently ran the automobile that it was driven against the plaintiff.[13] A complaint in an action for injuries to the occupants of an automobile from collision with a street-car, which alleges that defendants willfully, wantonly and recklessly propelled their street-car at a high and dangerous speed against the automobile with knowledge of plaintiffs' peril and after defendants, by ordinary diligence, could have avoided the accident, would seem to state a cause of action based on willful wrong and injury, rather than on negligence.[14] And a complaint alleging that plaintiff was driving his automobile upon a public highway, that defendants were driving their automobile in plaintiff's wake, in the same direction, that when a short distance from plaintiff, defendants negligently and carelessly lost control of the speed of their machine, whereupon plaintiff turned out to the right of the highway, giving defendants ample room to pass without accident, but that defendants, with the intent and purpose of stopping their machine, willfully and deliberately turned and ran it upon and against plaintiff's automobile, states a cause of action for willful and intentional injury, and not for negligence. Plaintiff does not in such a case seek to recover for defendants' mere carelessness in losing control of their machine, for this would not of itself have occasioned the accident.[15]

13. Townsend v. Butterfield, 168 Cal. 564, 143 Pac. 760.

14. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119.

15. Tognazzini v. Freeman, 18 Cal. App. 468, 123 Pac. 540.

§ 185. Necessity of Alleging Negligence in Terms.— Although it is not necessary for the term "negligently" to appear in pleading, it must appear by direct averment that the acts causing the injury were done "negligently," where negligence is the gist of the action, unless the facts alleged themselves necessarily exclude any other hypothesis than that of negligence.[16] Thus, a complaint by a passenger against the driver of an automobile in an action for damages, which alleged that the driver was proceeding at a prudent rate of speed, that there were no lights or other warning of the danger except a small and narrow board placed as a barrier but which was invisible to plaintiff himself until the machine collided with it, when it was too late for the driver to stop in time to avoid the accident, though he attempted to do so, fails to state a cause of action, as it does not in terms aver negligence on the part of the driver, and the facts fail to show it conclusively.[17] But a complaint wherein it is alleged that while plaintiff was riding a bicycle along the right-hand side of the street, the defendants, who were operating an automobile in the contrary direction on the opposite side of the street, suddenly and without warning so altered the course of their machine as to drive it at high speed across the street and against plaintiff, has been held sufficient, although it did not specifically allege that defendant's acts were negligently done, the inference of negligence being, however, unescapable.[18] The rule that it is sufficient to characterize an act as negligently done does not apply, however, where the allegation is contradicted by other allegations in the complaint. And so, where it appears from other allegations that the act charged to have been negligently done was not so done, the complaint is

16. South v. County of San Benito, 40 Cal. App. 13, 180 Pac. 354; Herrick v. Oakland Motor Co., 29 Cal. App. 414, 155 Pac. 1006. See NEGLIGENCE.

17. South v. County of San Benito, 40 Cal. App. 13, 180 Pac. 354.

18. Herrick v. Oakland Motor Co., 29 Cal. App. 414, 155 Pac. 1006.

fatally defective.[19] It has been held in an action for the death of a bicycle rider in a collision with an automobile, where the complaint alleged that defendant "carelessly and negligently" drove, etc., that such allegation was not open to objection as surplusage, and that, though it were, a refusal to strike it out it is nevertheless without prejudice.[20]

§ 186. Necessity of Pleading Specific Acts.—At common law it was not necessary, in charging negligence in the operation of a vehicle by which injury was occasioned, to allege anything more than that the collision occurred, and that it occurred through the negligence of the defendant. This rule is still the rule of pleading in California.[1] While it is true that allegations of this general character,—as in a complaint for injuries sustained in a collision between an electric railway train and an automobile at a crossing, that plaintiff was traveling "with due care" and that defendant "in a negligent manner and at a great and negligent rate of speed" ran its train over the crossing,—involve conclusions of law, it is none the less true that they are conclusions of fact, drawn from the facts and circumstances attending the collision, and are, therefore, allegations of those ultimate facts which it is the province of a pleading to set out.[2] Hence, where a complaint in terms alleges that the act complained of was done by the defendant, "carelessly and negligently," no further allegation of negligence is, ordinarily, necessary, and the particular acts constituting the negligence need not be further alleged.[3] Accordingly, a complaint

19. South v. French, 40 Cal. App. 28, 180 Pac. 357.

20. Peluso v. City Taxi Co., 41 Cal. App. 297, 182 Pac. 808.

1. Todd v. Orcutt, 29 Cal. App. Dec. 572, 183 Pac. 963; Saylor v. Taylor, 29 Cal. App. Dec. 449, 183 Pac. 843; Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713; Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40; Christie v. McCall, 35 Cal. App. 546, 177 Pac. 507. See NEGLIGENCE.

2. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

3. Saylor v. Taylor, 29 Cal. App. Dec. 449, 183 Pac. 843; Mathes v.

in a pedestrian's action for injuries from a collision with an automobile, which alleges that defendant was operating his machine at a high and fast rate of speed, and that he negligently and without warning to plaintiff collided with and struck him, is not subject to general demurrer, though it fails to allege that the rate of speed caused the accident.[4] But it is a well-understood rule of pleading in negligence cases that, while general negligence may be relied on without pleading specific acts of negligence, yet, where specific acts are relied on for a recovery, they must be specially pleaded.[5]

§ 187. Pleading Ordinances.—Under the general rule that it is sufficient to allege the collision of defendant's vehicle with plaintiff, and that it was due to defendant's negligence, without specifying the particular item of negligent conduct, it is also sufficient, where defendant's negligence consists in the violation of a municipal ordinance, to still preserve the general character of the allegation, and the ordinance itself need not be pleaded. The existence and violation of the ordinance may be given in evidence in aid of the general negligence alleged. The ordinance being simply evidentiary matter, it has been held improper to plead it.[6] And an order striking such matter from the complaint has been sustained.[7]

When violation constitutes negligence per se.—The failure to plead the ordinance does not alter the effect of

Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713; Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40; Christie v. McCall, 35 Cal. App. 546, 177 Pac. 507.

4. Meier v. Wagner, 27 Cal. App. 579, 150 Pac. 797.

5. Fimple v. Southern Pac. Co., 38 Cal. App. 727, 177 Pac. 871.

6. Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40 (applying rule to ordinance forbidding short left-hand turn at street intersections); Santina v. Tomlinson, 36 Cal. App. 29, 171 Pac. 437; Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235 (applying rule to ordinance regulating movement of electric trains through city). See infra, § 207, as to admissibility of ordinance in evidence.

7. Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235.

its violation as negligence per se. The rule in other jurisdictions that if the violation of the ordinance is intended to be relied on as negligence per se, the ordinance must be pleaded, and that otherwise, while admissible in evidence, its violation is merely evidence of negligence to be considered with all the other evidence in the case, is not the law in California. In this state the plaintiff is authorized, when he relies for recovery upon an act constituting negligence as a matter of law, to prove the act, and the ordinance which makes it culpable, under his general allegation of negligence.[8] The rule under discussion has recently been extended to the case of a municipal ordinance making it a misdemeanor for a contractor who has rendered a street dangerous not to guard it with barriers and warning lights. Such an ordinance is properly admitted in evidence in a suit by a passenger in an automobile injured when the machine fell into a trench excavated by a sewer contractor, though the complaint merely alleges negligence in maintaining the trench without barriers or lights, and does not specially plead the ordinance.[9]

§ 188. **Title to the Vehicle.**—It is not necessary, in a complaint for injuries to one riding in a motor vehicle from collision with another vehicle, to allege the capacity in which the plaintiff was being driven, whether as guest or otherwise, as such fact is germane only to the defense of contributory negligence;[10] nor is it necessary to allege the ownership of the machine. If the question of plaintiff's relationship to the title or management of the automobile becomes important, it may be shown under the defendant's plea of contributory negligence. And though it be necessary to make such a showing, a point by no means decided, an allegation that it was a public convey-

8. Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

9. Martin v. Shea, 182 Cal. 130, 187 Pac. 23.

10. Wiley v. Young, 178 Cal. 681, 174 Pac. 316.

ance in which he was a passenger, justifies the inference that he was neither owner nor driver of the car.[11] As to the relation of the defendant to the title or management of the automobile occasioning the injury, it has been held that a complaint which, while not alleging in terms that defendant drove it, does allege that by reason of the carelessness of defendant "in so operating and driving" the machine, the collision occurred, has been held sufficient as against a general demurrer, no special demurrer for uncertainty being interposed.[12] It has been held that a complaint for injuries to a passenger in an automobile at a railroad crossing, which alleges ownership of the gasoline motor car which collided with the automobile to be in the railroad company, and also alleges negligent operation of the motor car by the company's employees, sufficiently charges negligence against the company.[13]

§ 189. Pleading Contributory Negligence.—As in actions generally, contributory negligence is an affirmative defense which must be set up by the defendant, where it is to be relied on, as a defense in an action to recover for damages resulting from the negligent operating of motor vehicles.[14] It need not be negatived by the plaintiff, the rule in California differs, in this respect, from that of some other jurisdictions.[15] Hence, a complaint for injuries from a collision between an electric railway train and an automobile should not set out details of the accident even sufficiently to show that the plaintiff was free from negligence.[16] If there was contributory negligence,

11. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

12. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

13. Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030. See infra, § 190, as to admissions in answer.

14. Wiley v. Young, 178 Cal. 681, 174 Pac. 316; Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407; Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405. See NEGLIGENCE.

15. Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405.

16. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

it should be pleaded in the answer. In this connection it has been held that an answer alleging that plaintiff did not exercise ordinary care, caution or prudence to avoid the accident, and that the accident and injuries were directly and proximately contributed to and caused by the fault, carelessness and negligence of plaintiff, etc., is, in the absence of special demurrer, a sufficient allegation of the contributory negligence of an automobile driver.[17] However, in an action for damages for injuries resulting from the collision of two automobiles, if defendant's answer fails to set up the defense of contributory negligence, yet where he also seeks affirmative relief by way of cross-complaint in which plaintiff's negligence is fully averred, the question of contributory negligence is properly in issue. A verdict against the plaintiff in such case has been held to be supported by the pleadings taken as a whole.[18]

§ 190. Admissions in Answer.—Where in an action by a pedestrian for injuries from an automobile alleged to have belonged to defendant and to have been driven by his employee, the answer admits that defendant had a person in his employ whose duty it was to drive an automobile for defendant, but denies that at the time and place mentioned "the automobile of the defendant was driven or propelled by the driver thereof, or any employee of the defendant, negligently or unlawfully," etc., it was held that this amounts to an admission that the machine which caused the pedestrian's injuries belonged to the defendant, and was being driven by his servant, and it was, in that state of the pleadings, unnecessary for the pedestrian to offer proof of those facts.[19] If a complaint is defective in alleging negligence in the defendant in a case

17. Griswold v. Pacific Electric Ry. Co., 30 Cal. App. Dec. 922, 187 Pac. 65.

18. Grover v. Morrison, 32 Cal. App. Dec. 273, 190 Pac. 1078.

19. Humphrey v. United States Macaroni Co., 33 Cal. App. Dec. 219,. 193 Pac. 609.

of this character, the defect may, nevertheless, be cured by averments in the defendant's answer.[20]

§ 191. **Issues, Proof and Variance.**—Where a complaint for injuries from a collision between automobiles is founded on the theory of willful and intentional injury, the question of defendant's negligence is not a material issue. Proof of mere negligence only would constitute a fatal variance.[1] In an action against a lawyer for negligence in the operation of his automobile, involving the violation of a municipal ordinance, his occupation is not a material subject of inquiry, as it does not operate to charge him especially with knowledge of the ordinance.[2] In an action for injuries to a boy of nine from a collision with an automobile, his capacity to be guilty of negligence is not an issue requiring either allegation or finding, but his age is a mere probative fact bearing on the ultimate issue of whether he was in fact guilty of contributory negligence.[3] Where an allegation in a complaint is that defendant "so unskillfully, carelessly and negligently and recklessly" ran his automobile that it "was driven wantonly and maliciously" at more than twenty miles an hour upon plaintiff, the gravamen of the case is negligence and not malice. Hence, a case so pleaded can be established by proof of the collision, and that it was caused by defendant's negligence, without proving malice, wantonness or recklessness, and without proving that the machine was going twenty miles an hour.[4]

§ 192. **Demurrer.**—Under the general rule that error in overruling a special demurrer for uncertainty is not prejudicial when the defendant was not misled by the

20. Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030.

1. Tognazzini v. Freeman, 18 Cal. App. 468, 123 Pac. 540.

2. Story v. Green, 164 Cal. 768, Ann. Cas. 1914B, 961, 130 Pac. 870.

3. Todd v. Orcutt, 29 Cal. App. Dec. 572, 183 Pac. 963.

4. Townsend v. Butterfield, 168 Cal. 564, 143 Pac. 760.

pleadings, and the case was fairly tried on its merits,[5] it is not prejudicial error to overrule such a demurrer to a complaint alleging that an automobile driver turned at a street intersection at a speed of more than fifteen miles an hour, though the complaint fails to show whether the claim of negligence consisted in turning a sharp curve at this speed, in violation of the express provision of the speed laws, or whether only the general requirement of reasonable speed applicable to the traversing of intersecting streets was charged to have been disobeyed, it appearing that the facts were fully developed at the trial.[6]

§ 193. Waiver of Defects in Pleading.—It is a general rule that though allegations or denials in pleadings may be defective, yet if the parties have tacitly consented to treat them as sufficient, and have gone to trial on that assumption, and the facts have been fully developed under it, it is then too late to raise the question of the defect.[7] This rule has been variously applied in automobile cases. Thus, where plaintiff sued for injuries from the operation of an automobile by two defendants, alleging ownership in a third, whose agents they were, a denial by the owner that his codefendants, or either of them, were operating his car, or any car, on the day in question, either on that highway or in the vicinity, and similar denials by the other defendants, though artificial and complex, will be treated as raising the issues of identity and ownership of the automobile and of the identity of its drivers, after the plaintiff has himself so treated them by introducing evidence to prove these issues. Hence, an instruction that the identity of the car is admitted by the pleadings in such a case is erroneous.[8]

5. See APPEAL AND ERROR, vol. 2, p. 1010.

6. Christie v. McCall, 35 Cal. App. 546, 177 Pac. 507.

7. Busch v. Los Angeles Ry. Co., 178 Cal. 536, 2 A. L. R. 1607, 174 Pac. 665; Henderson v. Northam, 176 Cal. 493, 168 Pac. 1044; Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234; Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358; Tognazzini v. Freeman, 18 Cal. App. 468, 123 Pac. 540. See APPEAL AND ERROR, vol. 2, p. 1011.

8. Henderson v. Northam, 176 Cal. 493, 168 Pac. 1044.

And though a complaint may be defective in its allegation that defendant was the driver of the automobile that occasioned the injury, yet when the answer tenders the issue by a direct averment that defendant was not in possession or control of the car, and the issue so tried as though the complaint were sufficient, error in overruling a demurrer to it is without prejudice.[9] The rule is applicable also, where, although the issue of contributory negligence is not made by the pleadings, for if the defendant himself tries the case on the theory of contributory negligence and asks instructions thereon, which are given, he cannot complain of an additional instruction on the subject, that it is outside the issues.[10]

Evidence.

§ 194. Judicial Notice.—It is proper for a trial judge to take judicial notice that a certain city street is in the "business district," as that phrase is used in the Motor Vehicle Act limiting the speed of motor vehicles within the business district of any incorporated city or town to fifteen miles an hour, and to so instruct the jury, as authorized by section 2102 of the Code of Civil Procedure where the character of the street is a matter of common, every-day knowledge in that jurisdiction.[11]

§ 195. Burden of Proof—Rules Generally.—The burden of proving negligence in actions for damages resulting from the negligent operation of motor vehicles, as in actions generally,[12] is on the plaintiff;[13] as is also the

9. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

10. Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234.

11. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223. See infra, § 249, as to judicial notice of meaning of provision of Vehicle Act regarding headlights. See note 8 A. L. R., p. 33, as to experimental evidence of the speed of automobiles.

12. See NEGLIGENCE; TRIAL.

13. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398;

burden of proving that the defendant's negligence was the proximate cause of injury,[14] and the burden of establishing each element of negligence relied on. Thus, if a passenger in an automobile suing for injuries from a collision with a gasoline motor car operated on defendant's railroad relies on the motorman's failure to apply his brakes as an element of negligence, the burden is on her to establish that fact.[15] But the plaintiff is bound to prove negligence in the defendant, not beyond, but merely by, a preponderance of the evidence.[16] Where the doctrine of respondeat superior is invoked, the burden is on the plaintiff to establish its applicability. Thus, the burden is on a spectator of an automobile road race, injured by the alleged negligence of a driver of one of the racing cars, to establish by a clear preponderance of the evidence, both that the automobile sales company which he sues was the owner or in possession of the car and was the entrant thereof, and also that the driver was in its employ.[17] The burden is on the plaintiff, also, to show that the employee was acting within the scope of his employment at the time his negligent operation of the machine caused the accident.[18] And it is incumbent on the plaintiff to show affirmatively that the employee was not following his usual custom at the time the accident occurred, assuming that the fact is at all material to the employer's liability.[19]

Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38; Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709; Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

14. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398; Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

15. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709.

16. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

17. Johnson v. Reliance Automobile Co., 23 Cal. App. 222, 137 Pac. 603.

18. Nussbaum v. Traung Label etc. Co., 31 Cal. App. Dec. 778, 189 Pac. 728; Johnson v. Reliance Automobile Co., 23 Cal. App. 222, 137 Pac. 603.

19. Nussbaum v. Traung Label etc. Co., 31 Cal. App. Dec. 778, 189 Pac. 728. See supra, §§ 91, 92, as to presumption, arising from proof

§ 196. Doctrine of Res Ipsa Loquitur.—The doctrine of res ipsa loquitur is thus stated: When the thing which causes the accident is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in absence of explanation by the defendant that the accident arose from the want of ordinary care by him. Under such circumstances, proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised.[20] There is no inconsistency between the doctrine of res ipsa loquitur and the general rule that the burden of proving defendant's negligence rests on the plaintiff. The fact that the doctrine may be applicable to the case, although it permits the jury to infer negligence on defendant's part does not relieve the plaintiff of the ultimate burden of the issue.[1] As a general rule, the doctrine does not apply to ordinary collisions in which motor vehicles are involved.[2] However, the doctrine may be deemed to be applicable to a collision occasioned by an automobile when it would not apply to one in which a vehicle drawn by a runaway horse was the agent. For automobiles, when properly managed, do not, in the ordinary course of things, become involved in collisions. But the fright and escape from control of a horse may as reasonably be assumed to be due to a stranger's negligence as to that of its driver. Thus it has been held that the doctrine applies to the case of an automobile colliding,

of ownership of automobile, that driver was agent of owner, and as to burden of rebutting it.

20. Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931. See NEGLIGENCE.

1. Onell v. Chappell, 38 Cal. App. 375, 176 Pac. 370.

2. Hagenah v. Bidwell, 31 Cal. App. Dec. 765, 189 Pac. 799; Depons v. Oriss, 59 Cal. Dec. 351, 188 Pac. 797; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38 (collision between two automobiles); Busch v. Los Angeles Ry. Co., 178 Cal. 536, 2 A. L. R. 1607, 174 Pac. 665 (collision between automobile and street-car).

after dark, with a lighted delivery wagon in plain view, standing rightfully on the left-hand side of a fully lighted street as a delivery is about to be made, the roadway being in good condition, forty-eight feet wide, and no other vehicles being within the block, and the driver of the wagon being unaware of the automobile's approach till the collision occurs. In such a case the burden is on the driver of the automobile to explain the accident, under the rule that he who has peculiarly within his power the means of producing evidence of reasonable care should be required to do so.[3]

§ 197. Burden of Proving Contributory Negligence.—It is a general rule that contributory negligence is an affirmative defense, the burden of proving which rests on the defendant;[4] unless, as it may be in special cases, the rule is changed by statute.[5] Applying the general rule, it has been held that where a passenger in an automobile fell into an excavation in a city street maintained without barriers or lights, the burden of proving that the injury was due to the negligence of the driver of the machine is on the defendant after its fault in failing to maintain legal lights or barriers is shown.[6] But although the burden of proving contributory negligence is on the defendant, this does not mean that evidence adduced by the plaintiff which shows contributory negligence can be disregarded by the jury.[7] Contributory negligence on the part of a

3. Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931. See notes, 2 A. L. R., p. 1612, and 5 A. L. R., p. 1240, as to res ipsa loquitur as applied to automobile accidents.

4. Learned v. Peninsula Rapid Transit Co., 33 Cal. App. Dec. 264, 193 Pac. 591; Martin v. Shea, 182 Cal. 130, 187 Pac. 23; Bidwell v. Los Angeles etc. Ry. Co., 169 Cal. 780, 148 Pac. 197; Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407; Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405; Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358. See NEGLIGENCE.

5. See infra, § 198, as to burden in suits for injuries from defective highways.

6. Martin v. Shea, 182 Cal. 130, 187 Pac. 23.

7. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36.

passenger in a motor bus operated as a common carrier for hire, is not presumed from the mere fact of his injury. The general rule applies, and operates to place the burden of showing contributory negligence, as well as the further defenses of inevitable accident or the intervening negligence of a third person, on the owner of the vehicle. But this does not mean that when the whole case is in, these defenses, or one of them, must have been established by a preponderance of the evidence. While the burden of meeting the passenger's prima facie case as made out by the fact of injury is on the defendant carrier, yet the burden of finally establishing his right to recover by a preponderance of the whole evidence remains on the passenger, and unless he sustains it, recovery cannot be had. In other words, the burden placed on the defendant is that of initiative of proof rather than weight of evidence.[8] The burden of showing contributory negligence is not, as a rule, aided by presumptions. Hence, it has been held that the fact that the driver of an automobile has been over the highway before does not raise a conclusive presumption that he knows of a railroad crossing on the highway.[9]

§ 198. Presumption of Due Care for One's Own Safety. Under the statutory presumption, which is a rule of evidence, that a person takes ordinary care of his own concerns,[10] a passenger in an automobile, who is killed in a collision with a railroad engine, and who had an interval of five seconds unobstructed view as the machine approached the tracks, will be presumed, in the absence of evidence, to have looked, discovered the oncoming locomotive, warned the driver, and, perceiving that the warning went unheeded, to have attempted to leave the car. It

8. Learned v. Peninsular Rapid Transit Co., 33 Cal. App. Dec. 264, 193 Pac. 591. See supra, § 195, as to burden being, in general, on the plaintiff to show proximate cause. See CARRIERS.

9. Whitney v. Northwestern Pac. R. Co., 39 Cal. App. 139, 178 Pac. 326. See infra, § 198, as to burden on plaintiff, in cases arising under "Pridham Act."

10. Code Civ. Proc., § 1963.

was assumed that it was his duty, in the exercise of ordinary care for his own safety, to do all this in the space of time available for action.[11] But the provision of the so-called "Pridham Act" that no liability for injuries from the condition of the highway shall rest on highway officials unless it shall appear that the injury was sustained while the highway was being carefully used and that due care was exercised to avoid the danger,[12] changes the rule that contributory negligence is a matter of defense, and casts the burden on the driver of an automobile suing for injuries from a defective highway to prove himself free from contributory negligence. This provision, therefore, destroys, in this class of cases, the legal presumption that persons use due care for their own safety, although the disposition of rational persons to avoid injury to themselves may still be taken into account by the jury in inferring from the evidence, where the facts shown warrant it, that due care was exercised. The distinction is a nice one, but it seems that the legal presumption of due care is no longer sufficient, unaided by positive testimony, to sustain a finding of due care in this variety of actions.[13]

§ 199. Admissibility of Evidence in General.—A witness to a collision may give evidence as to any material and relevant fact of which he has acquired knowledge through his own perceptions, even though it may involve a description of his own conduct, and though he is not himself a party to the suit.[14] It is also a rule that the mere fact of the admission of immaterial evidence in respect to a collision is not necessarily prejudicial.[15] Where the testimony in an action for injuries resulting from a

11. Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405.

12. Act 2554, Stats. 1911, p. 1116.

13. Ham v. Los Angeles County, 31 Cal. App. Dec. 496, 808, 59 Cal. Dec. 474, 189 Pac. 462.

14. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

15. Dilger v. Whittier, 33 Cal. App. 15, 164 Pac. 49.

collision with an automobile, showed that the plaintiff was dragged fifteen or twenty feet, it has been held that evidence of a witness that he visited the scene of the accident the next morning and found alongside a trail of blood and the track or imprint of a wheel made under the restraint of brakes, was properly admitted in corroboration.[16] And where there is evidence that an automobile driver in turning to the right into an intersecting street passed beyond the center of it, a question addressed to a witness which assumed that to be the fact was held proper, though there was also evidence to the contrary.[17]

§ 200. Financial Condition of Parties—Insurance.—In an action for injuries alleged to have resulted from negligence of an automobile driver, evidence of plaintiff's poverty is inadmissible, even though it might have enhanced the mental worry arising from the knowledge of his incapacity following the accident.[18] And where there is neither averment nor proof of fraud, oppression or malice, an inquiry into the defendant's wealth for the purpose of affecting the amount of the recovery, is also improper.[19] Hence, attempts to show that the defendant carries indemnity insurance have usually been frustrated by the courts. And so it has been held that a municipal ordinance requiring jitney bus operators to maintain insurance against accidents for the benefit of persons injured by their machines is inadmissible in an action against a jitney bus driver for injuries so occasioned.[20] Following the same rule, in an action for damages from a collision between automobiles, it has been held improper, on cross-examination of a doctor testifying for the defendant, to question him as to whether an examination of the plaintiff was not

16. Meier v. Wagner, 27 Cal. App. 579, 150 Pac. 797.

17. Pemberton v. Arny, 180 Cal. 762, 182 Pac. 964.

18. Steinberger v. California Electric etc. Co., 176 Cal. 386, 168 Pac. 570. See for the rule in general, DAMAGES.

19. Story v. Green, 164 Cal. 768, Ann. Cas. 1914B, 961, 130 Pac. 870.

20. Baldarachi v. Leach, 30 Cal. App. Dec. 742, 186 Pac. 1060.

made by him at the instance of an indemnity insurance company. However, the remark of the driver of an automobile, immediately after a collision with another machine, that he carried accident insurance which would provide for the other driver if he was injured, is held admissible in a suit against him as an admission of liability for the accident.[1]

§ 201. **Liability of Employer.**—Where the issue in an action for damages for injuries resulting to a pedestrian from a collision with an automobile was whether the chauffeur was acting at the time within the scope of his employment, evidence that a superior servant having authority over the chauffeur had instructed him to return the machine to the garage, and that he took it out into the streets in violation of such instruction, should have been admitted, after the authority of the superior servant to speak for the owner of the car had been shown.[2] Where it is sought to hold one responsible for the negligence of another in operating an automobile, by virtue of a relationship established by a particular conversation, questions as to previous employment are immaterial. But where admissions concern an ultimate fact not in issue, they are permissible as an expeditious method of disclosing the fact, and are not objectionable as calling for the conclusion of the witness.[3]

§ 202. **Character and Capacity of Driver.**—In an action for injuries alleged to have been caused by the negligence of defendant's chauffeur in the operation of his machine, evidence that the chauffeur is a capable, efficient and careful driver and bears a reputation as such, is wholly immaterial, the question at issue in such cases, being not as to the general character or reputation of the driver, but

1. McPhee v. Lavin, 60 Cal. Dec. 31, 191 Pac. 23.

2. Adams v. Wiesendanger, 27 Cal. App. 590, 150 Pac. 1016.

3. Stoddard v. Fiske, 35 Cal. App. 607, 170 Pac. 663. See infra, § 205, as to admissibility of servant's admissions.

whether, on the occasion of the accident, he was negligent.[4] However, in an action against a school of automobile instruction for injuries sustained by the mismanagement of one of its machines driven by a student under the direction of an instructor, a question put to the instructor as to whether the student was a qualified driver was held not objectionable as calling for immaterial evidence, but as material in showing whether the car was under the management of a competent driver at the time of the accident.[5]

Intoxication.—The testimony of the driver of an automobile in an action against a street railway company for injuries from a collision at a street intersection, that certain liquor he had drunk earlier in the day had not had any perceptible intoxicating effect on him, and of others that he was not intoxicated, is admissible.[6] And where in an action for injuries from the collision of two automobiles the evidence shows that the driver of the machine in which plaintiff was a passenger was drunk as plaintiff knew, the admission of further evidence that the driver was of intemperate habits, frequently drove in an intoxicated condition, and was subject to seizures when driving which made him temporarily helpless and unable to control his machine, whether competent or not, is at all events not injurious.[7]

§ 203. Operation of Horse-drawn Vehicles.—In an action for injuries to the occupants of a buggy from a collision with an automobile, evidence of the disposition of the horse drawing the buggy is properly excluded where there is no showing or offer to show that the horse became frightened or unmanageable until after the collision had

4. Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35.

5. Easton v. United Trade School Contracting Co., 173 Cal. 199, L. R. A. 1917A, 394, 159 Pac. 597.

6. Bidwell v. Los Angeles etc. Ry. Co., 169 Cal. 780, 148 Pac. 197.

7. Lynn v. Goodwin, 170 Cal. 112, L. R. A. 1915E, 588, 148 Pac. 927.

occurred.[8] Where a traffic ordinance requires vehicles stopping in the street to leave the side next the curb within two feet thereof, except in certain cases of emergency, it is improper for the driver of a buggy who stopped with his rear wheel four feet from the curb on account of restricted parking space, in which position the buggy was struck by a passing automobile, to testify that he intended on alighting to lift the rear end of his buggy around toward the curb as, if he was guilty of negligence, the character of his act could not be altered by his undisclosed intention to thereafter move the rear wheels. But as this was the only method by which he could comply with the ordinance, until he had time to do it, the emergency contemplated by the ordinance, if such there was, continued, and the mere additional testimony as to his intent was not sufficiently serious to justify a reversal.[9]

§ 204. Proof of Other Violations of Law by Defendant. While failure to perform a duty imposed by statute is evidence of negligence, the act or omission, in order to warrant its consideration by a jury, must have contributed directly to the injury. Hence, in a suit for injuries occasioned by the alleged negligent management of an automobile, evidence that the drivers, though they saw the accident, did not stop to give their names and addresses, is not proper for the jury to consider in reaching a verdict, and an instruction to the contrary is error.[10] Where the driver of an automobile, sued for colliding with a wagon, denied that he had ever driven his machine through the streets at thirty or thirty-five miles an hour, any error in allowing such a question to be put is harmless. And a question put to the plaintiff as to whether the defendant said anything to him about being in the habit of driving at a reckless speed, which is answered in

8. Oberholzer v. Hubbell, 36 Cal. App. 16, 171 Pac. 436.

9. Collins v. Marsh, 176 Cal. 639, 169 Pac. 389.

10. Henderson v. Northam, 176 Cal. 493, 168 Pac. 1044.

the negative, is also harmless. So, also, is a question whether the plaintiff had seen defendant driving an automobile previously, which is answered "yes," but without mention of any rate of speed.[11]

§ 205. Proof of Admissions in General.—Under the rule authorizing proof of the extra-judicial admissions or declarations of a party against his own interest as to a matter in issue, and which is embodied in the Code of Civil Procedure,[12] it is proper to receive evidence that the driver of an automobile, sued for injuries arising from a collision with a wagon at a street crossing, stated to the witness after the accident that he was going at a speed of not less than fifteen miles an hour. The admission was significant, both because it tended to show a speed at the time of the accident so great as to make it difficult to stop in an emergency, and because a municipal ordinance had been introduced in evidence prescribing a speed limit of eight miles an hour, and four miles at street crossings. Under the same rule, the driver's admissions after the accident that he was going over the speed limit, and that he did not blow his horn or give other warning because he never thought of it, are likewise admissible.[13]

Testimony of a witness that he heard defendant say at the time of a collision between automobiles, "My car is hurt just as much as the other car," is admissible on the issue of defendant's ownership, its precise meaning being for the jury.[14] But evidence of what a motorcycle rider, injured in a collision with an automobile, said after the accident about the damage done to the automobile, is immaterial, for though the condition of the automobile after the accident might be material, what the plaintiff

11. Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

12. Code Civ. Proc., § 1870, subd. 2. See EVIDENCE.

13. Scragg v. Sallee, 24 Cal. App 133, 140 Pac. 706.

14. Hammond v. Hazard, 40 Cal. App. 45, 180 Pac. 46. See supra, § 200, as to defendant's admission that he carried indemnity insurance.

said about it would not be.[15] And under the rule that negligence or its absence cannot be proved by similar instances, it is improper to permit the driver of an automobile, on cross-examination in a suit by a pedestrian for injuries from tripping over the tow rope, to be asked if he had not stated to the plaintiff after the accident that four other persons had tried to cross between the two machines before they reached the scene of plaintiff's accident, such testimony referring to a collateral fact as to which the witness could not be impeached, and inadmissible as independent evidence, because its only tendency was to show that others could not see the rope and therefore that plaintiff was not negligent in failing to see it, or that the fact that others did not see it should have indicated to the driver that warning of its presence was necessary.[16] The statements of the driver of an auto stage, shortly after a collision, as to the speed at which he was traveling at the time are no part of the res gestae, and are inadmissible against his employer. But when such declarations conform to his own testimony given at the trial, or are of an exculpatory rather than an incriminating nature, their admission is harmless error.[17]

§ 206. Tacit Admissions.—Under the rule that to render statements of a third person in the presence of a party admissible in evidence against the latter by reason of his silent acquiescence in them, it must clearly appear that he heard and understood them, and that the circumstances were such that acquiescence might fairly be inferred from silence,[17a] the announcement of a megaphone man at an automobile race that a certain person had entered his car in a certain race, with a certain other person as driver, is inadmissible to prove either ownership of the car or a joint

15. Townsend v. Keith, 34 Cal. App. 564, 168 Pac. 402.

16. Steinberger v. California Electric etc. Co., 176 Cal. 386, 168 Pac. 570.

17. Baker v. Western Auto Stage Co., 32 Cal. App. Dec. 651, 192 Pac. 73.

17a. See EVIDENCE.

undertaking or partnership between the alleged owner and driver to race the car; and this is true though the testimony also shows that the alleged owner was near by at the time, it not appearing either that he heard the announcement, or failed to deny it.[18] In an action against an automobile driver to recover damages for injuries sustained by a pedestrian, the testimony of a witness that immediately after the accident he said to the defendant, "You had ought to be strung up by the heels for running into a woman in that fashion," and that defendant made no reply, is admissible on the theory that the jury, estimating it in the light of the character of the defendant and the circumstances of the case, may find in defendant's silence a tacit admission of responsibility, though the witness' assertion was not evidence in itself, and, if made out of defendant's hearing, its admission would have been prejudicial error.[19]

§ 207. Admissibility of Ordinances in General.—In an action for personal injuries received from a collision with an automobile on a city street, the existence of a traffic ordinance and the fact of its violation are essentially matters of evidence, and not of pleading, and therefore are, generally speaking, admissible in evidence under the general averment of negligence.[20] A municipal ordinance providing that the driver of any vehicle on the approach of an ambulance shall immediately stop as near as possible to the right-hand curb and so remain till the ambulance has passed, is admissible in an action by an automobile driver for injuries from a collision with an ambulance at a street intersection, as bearing on the negligence of both parties, though the two vehicles were approaching at right angles and the automobile stopped in the center of the intersection. And even if improperly admitted

18. Henderson v. Northam, 176 Cal. 493, 168 Pac. 1045.

19. Baldarachi v. Leach, 30 Cal. App. Dec. 742, 186 Pac. 1060.

20. Santina v. Tomlinson, 36 Cal. App. 29, 171 Pac. 137. As to pleading ordinance, see supra, § 187.

because not purporting to regulate the conduct of vehicle drivers at street intersections, still the error may be harmless in view of the court's instruction that the ambulance driver had a right to assume that the automobile would continue across the intersection at the same speed.[21] In a case where the evidence showed that an automobile had approached a bridge at considerable speed, which may have occasioned the accident, it has been held that the exclusion from evidence of a county ordinance which fixed a speed limit of five miles an hour at bridges was error.[22] And the admission of an ordinance in evidence which is immaterial, but where the effect of its admission tends to persuade the jury that the automobile driver had violated the ordinance, has been held to constitute prejudicial error.[23] Where the negligence of a motor vehicle driver in violating a city ordinance is not imputable to one about to become his passenger, it is not error to exclude the ordinance from evidence, in an action for injuries by the latter.[24]

§ 208. Harmless Error in Admitting Ordinance.— Where an ordinance is substantially the same as the state law, or where the motorist, when violating the ordinance, is also violating the state law, the admission of the ordinance in evidence, even if improper under the circumstances of the case, is without prejudice.[25] Accordingly, error in admitting a city ordinance fixing the speed limit for automobiles is harmless where the defendant driver's

21. Newman v. E. E. Overholtzer Sons Co., 59 Cal. Dec. 543, 190 Pac. 175. See supra, § 200, as to admissibility of ordinance requiring jitney bus drivers to carry indemnity insurance.

22. Ham v. Los Angeles County, 31 Cal. App. Dec. 496, 808, 59 Cal. Dec. 474, 189 Pac. 462.

23. Santina v. Tomlinson, 36 Cal. App. 29, 171 Pac. 437.

24. Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 Pac. 1059.

25. Humphrey v. United States Macaroni Co., 33 Cal. App. Dec. 219, 193 Pac. 609; Simmons v. Stephens, 32 Cal. App. Dec. 685, 191 Pac. 978; Pemberton v. Arny, 180 Cal. 762, 182 Pac. 964; Rawlings v. Fuster, 177 Cal. 740, 171 Pac. 955.

speed also violated the state law;[26] and, likewise, where the evidence showed that the motorist had violated the provision of the Motor Vehicle Act requiring drivers turning to the right into an intersecting street to keep to the right of the center of the intersection, the admission of a city ordinance requiring him to make the turn as close to the right-hand curb as possible, even if erroneous, would not be prejudicial.[27]

§ 209. Expert and Opinion Evidence in General.—The decisions are not in full accord as to the admissibility of expert evidence to show what would be proper operation of a motor vehicle under the circumstances of the particular case. Thus it has been held that testimony of witnesses in an action by a pedestrian for injuries from a collision with an automobile, that they could have stopped a machine of that type, assuming the brakes to have been in good order, and depending somewhat upon the resistance or traction of the road, in from fifteen to twenty feet when going at the speed of the automobile in question, and could have avoided a collision in eight or ten feet, was improperly admitted, both as furnishing a false standard by which to measure the conduct of the driver, and because immaterial in view of the defense that the automobile did not strike plaintiff, but that she had already been injured by some other vehicle. However, in view of this latter defense, the error was held to be harmless.[28] On the other hand, in an action for the death of a motorcycle rider through running into a continuous heap of crushed rock along the edge of the paved portion of the highway, in an effort to avoid a collision with another vehicle, a question asked an expert motorcycle rider as to what a rider should do on coming into sudden contact with such

26. Simmons v. Stephens, 32 Cal. App. Dec. 685, 191 Pac. 978; Humphrey v. United States Macaroni Co., 33 Cal. App. Dec. 219, 193 Pac. 609.

27. Pemberton v. Arny, 180 Cal. 762, 182 Pac. 964.

28. Meier v. Wagner, 27 Cal. App. 579, 150 Pac. 797.

an obstacle was held proper.[29] Evidence of an experienced chauffeur as to what pedestrians usually do when suddenly confronted by an automobile is inadmissible, since what persons usually do could not establish a custom binding on the person injured in the particular case.[30]

§ 210. **Estimates as to Speed.**—A witness testifying as to the speed of an automobile does not testify as an expert and need not qualify as such.[1] "The rule, as to which there is little conflict and applicable alike not only to automobiles, but all moving objects, is that a person of ordinary intelligence, having opportunity for observation, is competent to testify as to the speed at which an automobile is being operated at a given time."[2] Hence, it is not improper to permit a witness, called in an action against the driver of an automobile for colliding with a wagon, to state that he had never seen others drive any faster through the streets than defendant was going, and that he had seen other machines go at a pretty fast rate, the purpose of the evidence being to show that the witness was capable, from his habits of observation, of forming an approximately accurate judgment of the rate of speed at which defendant was traveling, and not to qualify him as an expert.[3] The objection that a witness who testifies to the speed of an automobile had not had a view of the

29. Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398.

30. Holroyd v. Gray Taxi Co., 39 Cal. App. 693, 179 Pac. 709. See supra, § 200, as to cross-examination of physician as to whether his examination of plaintiff was not made at instance of indemnity insurance company.

1. Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109; Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

2. Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109.

Evidence of a witness that an automobile was traveling at a lively gait, in a reckless way, less than one hundred feet from the point where it struck a bicycle rider, and that he saw several others make lively escapes at that distance, is admissible as tending to show the rate of speed of the machine when the accident occurred: Olsen v. Levy, 8 Cal. App. 487, 97 Pac. 76.

3. Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

car for a sufficient length of time to form an estimate of its rate of travel, goes to the weight rather than to the competency of the evidence, which is properly admitted for what it is worth.[4]

§ 211. Cross-examination and Rebuttal.—The usual rule limiting the scope of cross-examination to matters germane to the examination in chief applies, of course, to cases growing out of motor vehicle accidents. Thus, to permit witnesses called to testify to the extent of the damage done to an automobile in a collision to be cross-examined as to the radius within which it was possible to turn a car of that sort, the collision having been occasioned by two cars turning into each other, has been held to be error.[5] Where a witness makes conflicting statements in his testimony as to an issuable fact in the case, a question put to him on cross-examination as to which of his conflicting estimates is correct may be properly allowed in the interests of liberality of cross-examination on an important issue.[6] Where, in an action for injuries in a collision between an automobile and a bicycle, negligence is predicated on the automobile having been operated on the left-hand side of the street, and plaintiff gives evidence in chief as to the number of machines parked on the right-hand side, while defendant, in answer, gives evidence as to both their number and position, rebuttal evidence of plaintiff as to their position was held proper, and as to number, not so prejudicial as to require a reversal.[7]

4. Dilger v. Whittier, 33 Cal. App. 15, 164 Pac. 49.

5. Saylor v. Taylor, 29 Cal. App. Dec. 449, 183 Pac. 843 (holding the error, however, not prejudicial in this case).

6. Quackenbush v. Los Angeles Ry. Corp., 28 Cal. App. 173, 151 Pac. 755. See supra, § 205, as to cross-examination as to admissions; and supra, § 200, as to cross-examination of physician as to whether his examination of plaintiff was not made at instance of indemnity insurance company.

7. Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37.

§ 212. **Proof as to Ownership and Agency.**—Under the provision of the Motor Vehicle Act requiring the owner of an automobile to register it in his name, the fact that one registers an automobile in his own name justifies a finding that he is the owner.[8] Testimony of witnesses that an auto truck occasioning an injury belonged to defendant, the testimony of one being positive and accompanied by the statement that defendant's name was painted on the truck, is sufficient to sustain a finding of defendant's ownership.[9] Evidence that a defendant advanced money for the purchase of an automobile, that he was then told by an agent of the assumed purchaser that the car was his till he was repaid, that he registered it in his own name, and that he occupied it with such agent at the time of accident, and busied himself with the collection of evidence, declared he would pay all damage, and referred to the machine as "My car," has been held to justifiy a finding of ownership, notwithstanding the direct denial of ownership both by defendant and the agent. It has also been held that the fact that the owner of an automobile sits on the front seat with the driver, apparently acquiescing in its operation by him, may justify the inference of agency by the jury.[10]

§ 213. **As to Unlawful Speed.**—In view of the presumption that an automobile driver will not commit a crime by violating the speed limit prescribed by the Motor Vehicle Act, opinion evidence that a driver, killed by the overturning of the machine, had been violating the speed limit, based on the character and condition of the machine and marks on the highway showing that it had swerved from one side to the other and skidded ninety feet before overturning, is not conclusive on the Industrial Accident Commission, especially where the witnesses admit that the

8. Hammond v. Hazard, 40 Cal. App. 45, 180 Pac. 46 (under Motor Vehicle Act of 1913, see Stats. 1913, p. 641, §§ 3, 4).

9. Guderitz v. Boadway Bros., 39 Cal. App. 48, 177 Pac. 859.

10. Hammond v. Hazard, 40 Cal. App. 45, 180 Pac. 46.

marks might have resulted from a lawful speed.[11] In an action against the driver of an automobile for negligent injury, evidence that the machine was going "very fast," "pretty fast," and "at a good speed," is too uncertain to show that it was traveling at a speed in excess of the twenty miles per hour allowed by law.[12] But where the evidence shows that at a point one hundred or one hundred and fifty feet from the place of a collision the driver of an automobile was traveling at a speed of between ten and fifteen miles an hour, the jury may reasonably infer that at the moment of collision he was exceeding the speed limit of eight miles an hour as fixed by ordinance.[13] And testimony that an automobile was stopped within ten feet after it struck a child, and that a machine of that weight could not be stopped in that distance if it had been going at a greater speed than ten miles an hour, is not such a conclusive demonstration of that rate of speed as to require the setting aside of a verdict, since the jury may have disbelieved one or both propositions.[14]

§ 214. In Cases of Injury to Passengers.—In an action for injuries resulting to an automobile from a collision with an electric street-car, any evidence of negligence on the part of defendant contributing to the injury will require the denial of a motion for a nonsuit, negligence of the driver of the automobile not being imputable to plaintiff in such a case.[15] Testimony of a locomotive engineer that just as he struck an automobile he saw a passenger in the back seat leaning forward as if to speak to the driver warrants a special finding by the jury that the passenger was doing something for his own safety, in that he

11. United States Fidelity & Guaranty Co. v. Industrial Acc. Com., 181 Cal. 147, 183 Pac. 540.

12. Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38.

13. Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931. See infra, § 218, as to speed of gasoline motor car operated on railway track.

14. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223.

15. Lininger v. San Francisco etc. R. R. Co., 18 Cal. App. 411, 123 Pac. 235.

was either warning the driver or attempting to leave the machine.[16] The fact that the court found that the driver of an automobile in which plaintiff was a passenger was ignorant of a pitfall in the center of a city street, though the driver himself was not a witness and there was no formal proof on the point, has been held not prejudicial to the defendant.[17]

§ 215. In Cases of Collison With Pedestrians.—A finding by the jury of negligence in the driver of an automobile has been held justified by the facts that a pedestrian crossing a street observed the machine one hundred and fifty feet away coming at twelve miles an hour and saw it change its course, that he stepped backward, stopped and again stepped back, when the automobile again turned toward him and struck him.[18] Where the pedestrian was walking in the center of the street, questions as to whether there was a sidewalk provided at that point for the use of pedestrians, and whether its condition, if one existed, was such as to warrant persons of ordinary prudence in taking to the street, are, on conflicting evidence, for the jury.[19] Plaintiff's testimony that after the street-car on which he was a passenger had resumed its motion after stopping to discharge passengers, he looked to the rear and neither saw nor heard any automobile, and not seeing any automobile headlight, he then jumped from the moving car and was struck by defendant's machine, and defendant's testimony that after stopping behind the standing street-car to allow passengers from it to gain the curb he had resumed his advance with the moving street-car, and was traveling five or six miles per hour when plain-

16. Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 172 Pac. 405.

17. Martin v. Shea, 182 Cal. 130, 187 Pac. 23.

18. Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 Pac. 342 (holding that disputed testimony that the pedestrian was intoxicated, and that he stepped back into the path of the machine after having got clear of it, would not overthrow the finding).

19. Blackwell v. Renwich, 21 Cal. App. 131, 131 Pac. 94.

tiff suddenly swung down from the street-car directly in front of the automobile, present such a conflict as to require the questions of negligence and contributory negligence to be submitted to the jury.[20] It has been held that the fact that a pedestrian, struck by an automobile, was not thrown to the pavement, does not show that he was not injured, or constitute a failure of proof.[1]

§ 216. Collision With Animals.—The testimony of a horseback rider that, as he was riding northerly along the west side of a forty-five foot roadway, sitting sidewise on his horse, he glanced back and saw an automobile about eight yards away coming at high speed, that he was hard of hearing and had not heard its approach, that he tried to turn his horse to the left and had gotten its forefeet on a bench of earth along the roadside when the automobile struck the horse throwing its rider to the ground, does not, it has been held, present a case so at variance with natural possibilities as to require the jury to disregard it, and especially where it is corroborated by the admitted facts that the left head-lamp of the automobile was damaged and the horse injured on its left hind leg.[2]

§ 217. Collisions With Other Vehicles.—Evidence that the driver of an automobile approached a street crossing at an unlawful speed, that he did not sound the horn or give other warning, and that when plaintiff, who was driving a wagon, first saw him it was too late to do anything, sustains a finding that the collision resulting was solely due to the automobile driver's negligence, though evidence for the latter would also amply sustain the conclusion that he was not traveling at an excessive speed, and that the plaintiff carelessly drove in front of the machine.[3] Where in an action against the driver of an

20. Brown v. Broshear, 22 Cal. App. 135, 133 Pac. 505.

1. Ellis v. Sanberg, 31 Cal. App. 506, 182 Pac. 792.

2. Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58.

3. Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706.

automobile for injuries sustained in a collision between the machine and a wagon, the plaintiff's evidence wholly fails to show any negligence on the part of the driver of the automobile beyond the statements of witnesses that the machine was going very fast, pretty fast, and at a good speed, and four occupants of the automobile testifying for defendant say that both automobile and wagon had come to a stop and that then the horses attached to the wagon started up and ran into the machine, it has been held that there is such a want of proof of negligence as to justify the court in directing a verdict for the defendant.[4]

Evidence that a motorcycle rider approaching a street through an alley looked and listened but could not discern the approach of an automobile, though he did see a wagon, that he passed out into the street in front of the wagon and was immediately struck by defendant's automobile, going twenty-seven miles an hour, has been held sufficient to prevent a directed verdict for defendant, though defendant's chauffeur testified that he was traveling but fifteen miles an hour, that he stopped within eight feet, that his view of the mouth of the alley was obscured by a wagon, and that he did not know he had struck the motorcycle till he felt the jar. The case as presented is one where, though the trial court might set aside a verdict for plaintiff, it would not be compelled to, within the rule that to justify a directed verdict, the evidence must be such as to compel the court to set aside a contrary one.[5] Where the evidence is conflicting, the questions whether a driver of an automobile made a short left-hand turn into an intersecting street, instead of crossing such street before turning, and whether such action was negligent under the circumstances, are for the jury.[6]

4. Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38.

5. Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109. See VERDICT.

6. Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460.

§ 218. Collisions at Railway Crossings—Company's Negligence.—Evidence that a gasoline motor car operated on defendant's railroad ran sixty-five feet under brakes after colliding with an automobile at a street crossing, and then, the brakes failing to hold longer, coasted some three hundred and thirty-five feet farther before stopping, and that the automobile itself was hurled thirty feet by the force of the collision, sustains a finding that the gasoline motor car was traveling at a speed in excess of the eight miles an hour fixed by ordinance.[7] Evidence of the driver and passenger in an automobile that they did not hear any bell rung or whistle sounded as they approached a railway crossing will support a finding that no warning was given, though a number of unimpeached witnesses testify that they repeatedly heard both bell and whistle, the effect of their testimony being merely to create a conflict which it was for the jury to resolve.[8] And the court cannot set aside such a finding, though based on the negative testimony of witnesses that they did not hear, as against the positive testimony of others that they did.[9]

§ 219. Motorist's Contributory Negligence.—Contributory negligence being an affirmative defense, the burden of proving which rests on the defendant, the mere fact that the driver of an automobile injured while attempting to cross the tracks of a street railway, fails to testify that he looked and listened, there being no affirmative evidence that he did not do so, does not render a verdict in his favor erroneous as contrary to the evidence.[10] While it is true that the question whether one is guilty of contributory negligence is one for the jury, and it becomes a question of law for the decision of the court only when the

7. Martin v. Southern Pac. Co., 30 Cal. App. Dec. 332, 185 Pac. 1030.

8. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709; Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 Pac. 16.

9. Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 Pac. 16.

10. Bidwell v. Los Angeles etc. Ry. Co., 169 Cal. 780, 148 Pac. 197.

facts are undisputed, and even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of the plaintiff's negligence,[11] these observations are subject to the qualification that, in cases involving collisions with automobiles, as in other cases, the conflict of evidence must be substantial and real. And so, where it is evident that the driver of an automobile approaching an electric railway crossing must, if he looked and listened, have become aware of an approaching train, his mere testimony that he looked and listened but did not see or hear one is not enough to take the case to the jury or support a verdict in his favor.[12]

Instructions.

§ 220. Persons Liable.—In an action by a third person for injuries from a collision of two automobiles, an instruction that if both drivers, "or either," failed to exercise proper care they were negligent, though erroneous, is too trivial an error to warrant reversal where the correct rule that the one free from negligence would not be liable has been repeatedly stated in other instructions.[13] And though it is error to instruct that plaintiff is entitled to recover against one or both defendants, there being no question of contributory negligence or unavoidable accident, yet when the entire record bears out the court's statement, the error will be deemed harmless. It is error, however, to refuse to instruct for one defendant that the burden of proving his negligence rests on the plaintiff who, in order to recover, must establish it by a preponderance of the evidence.[14] An instruction that the owner and occupant of an automobile is responsible for its negligent operation by the driver, unless the jury find that he

11. See supra, §§ 71–73.

12. Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34.

13. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713.

14. Blackwell v. American Film Co., 32 Cal. App. Dec. 937, 192 Pac. 189.

parted by agreement with the right of control over it, is not objectionable as making the owner's liability depend on the right rather than the exercise of control, since, in the absence of evidence that he attempted to exercise control, the question of his right to do so was the determining factor.[15] Where the issue as to whether a chauffeur was acting, at the time of an accident, within the scope of his employment, was on the evidence for the jury to decide, an instruction that the test was whether the chauffeur was furthering his master's business or doing that which he was employed to do, with or without orders, and that if the jury should believe that the chauffeur, at the time of the accident, "was performing a duty which he was employed to perform, and that he was furthering his master's business, which he was,—then he was acting within the scope of his employment," is erroneous as taking the issue, in effect, away from the jury.[16]

§ 221. Contributory Negligence in General.—Though an instruction that a motorist's violation of a traffic ordinance, if it caused a collision, would entitle plaintiff to recover, ignores the defense of contributory negligence, the error is harmless where the defense is fully covered in other instructions, so that the jury is not misled.[17] But where the effect of the erroneous instruction is to take away from the jury the issue of contributory negligence, the error is not cured by other instructions correctly stating the law. As where the court instructed that, if a motorist whose view of a street crossing was obstructed by a passing street-car, ran around the street-car instead of stopping, thus injuring the plaintiff, he was guilty of gross negligence and was liable.[18] Where the court de-

15. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

16. Adams v. Wiesendanger, 27 Cal. App. 590, 150 Pac. 1016.

17. Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 Pac. 287. And see Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37, for a case when requested instructions as to the contributory negligence of a minor were held covered by other instructions.

18. Bellinger v. Hughes, 31 Cal. App. 464, 160 Pac. 838.

fined "ordinary care," and instructed that certain specific acts would constitute negligence in a party, and told the jury that plaintiff, on stated facts, could recover if not guilty of contributory negligence, the failure to specifically define contributory negligence was not reversible error, especially when the defendant did not request such an instruction, and the instructions as a whole were not misleading.[19] But an instruction that contributory negligence will not bar a recovery "if it be so slight as not to amount to a want of ordinary care" is erroneous. The term "contributory negligence" itself implies a want of ordinary care. If there is such a want, it does not matter how slight the deviation may have been from the required standard. If the plaintiff's conduct did not amount to a want of ordinary care, it did not constitute negligence at all. To speak, therefore, of negligence which is so slight as not to amount to a want of ordinary care, is to use terms which are self-contradictory.[20] An instruction that a horseback rider, injured in a collision with an automobile, was bound to use ordinary care and to observe all such dangers as could have been discovered by a person using ordinary care and possessed of ordinary sight and hearing, "provided he had ordinary hearing," is properly modified by the addition of the quoted phrase, it being admitted that the rider was deaf; nor is the modification objectionable as telling the jury that if the rider did not have ordinary hearing, he need not use ordinary care for his own safety.[1] Where the only connection of an employer and an employers' liability insurance company with an accident in which employees were injured is through the employees themselves, whose contributory negligence in driving a motor truck in front of a street-car is sufficiently covered by instructions, there is no necessity for

19. Freiburg v. Israel, 30 Cal. App. Dec. 961, 187 Pac. 130.

20. Steinberger v. California Electric etc. Co., 176 Cal. 386, 168 Pac. 570.

1. Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58.

further instructions as to the effect of negligence of the employer or the insurance company.[2]

§ 222. Imminent Peril. — Where a collision between a motorcycle and an automobile occurred in broad daylight, when each party was in plain view of the other and, according to some of the testimony, both vehicles were being operated at high speed, so that there must have been a time when it was apparent to each driver that a collision was possible, and when a slight swerving by either would perhaps have avoided it, an instruction on the standard of care required of persons in great peril is within the issues.[3] And testimony tending to show that by a change in direction of an automobile a pedestrian crossing the street was suddenly placed in peril, warrants an instruction as to the duty of one under circumstances of sudden and unexpected danger.[4] An instruction which correctly states the law governing the conduct of one in imminent peril is not rendered erroneous by the fact that it is justified by defendant's own version of the accident rather than by plaintiff's testimony, it being the duty of the court to give instructions expounding the law upon every reasonable theory of the case.[5] In an action for injuries from collision with a street-car, an instruction that though the defendants were negligent, and thereby caused some mistake, fright, or loss of presence of mind on the part of the driver of the automobile, still if the driver by his own negligence contributed proximately to his condition, and that thereby, by the mutual fault of both parties continuing up to the collision, the accident proximately resulted, there could be no recovery, is in substance a statement that if the mutual negligence of the parties created a dangerous emergency, and if through sudden

2. Commonwealth Bonding & C. Ins. Co. v. Pacific Electric Ry. Co., 29 Cal. App. Dec. 492, 184 Pac. 29.

3. Wiley v. Young, 178 Cal. 681, 174 Pac. 316.

4. Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 Pac. 342.

5. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743.

fright or loss of presence of mind the automobile driver made a mistake which prevented his escape, then he was responsible for his mistake, which should be considered negligence proximately causing the injury. As such, it is an attempt to transmute a more remote cause of accident into a proximate cause, and to deprive the driver of his right to be excused for acts done in a condition of fright in sudden danger, and is misleading and wrong.[6]

§ 223. Negligent or Willful Injury.—The complaint in every action should be founded upon a theory, and the plaintiff is entitled to have the jury instructed by the trial court upon the law applicable to the theory upon which the cause of action is founded.[6a] So, where a complaint in an action for injuries from a collision between automobiles is founded on the theory of willful and intentional injury and not on negligence, an instruction that plaintiff alleges that the injuries were caused solely by the carelessness and negligence of defendants, and that the burden of proof rests on him to prove this, and unless the jury is satisfied from the evidence that the injuries were caused solely by such carelessness and negligence, they must find for defendants, is erroneous. The error in such case is not cured by a further instruction that one committing a willful, wrongful act must respond in damages, and that if they found from the evidence that defendants willfully and deliberately caused the collision, verdict must be for plaintiff, the two theories as stated in the instructions being so absolutely opposed that the appellate court cannot determine which was followed by the jury. Such conflicting instructions cannot be harmonized on the theory that the term "negligence" is broad enough in its legal significance to cover both the careless and willful acts of defendants.[7]

6. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119.

7. Tognozzini v. Freeman, 18 Cal. App. 468, 123 Pac. 540.

6a. See TRIAL.

§ 224. Operation of Automobile in General.—A refusal to instruct that if defendants used ordinary care to see that their automobile was in good working order they were not negligent in that particular is not error where other instructions explained that plaintiff could not recover unless defendants were negligent in view of the situation and knowledge of the parties and all the circumstances. Where the maintenance of defective brakes on the automobile which struck the plaintiff is not alleged by him as an item of negligence, but the failure of the brakes to work is put forward by defendant in explanation of the alleged negligent operation of the car, an instruction in the language of the Motor Vehicle Act that "all motor vehicles must be provided at all times with adequate brakes, kept in good working order," is not objectionable as making defendant the insurer of the condition of the brakes, where other instructions clearly show that he is responsible only for negligence, to be determined in the light of his knowledge and all the circumstances of the case.[8] So an instruction in the language of the Motor Vehicle Act that an automobile driver before changing his course must "first see that there is sufficient space for such movement to be made in safety" is not objectionable as making the driver responsible not merely for diligence, but for actually visualizing the situation, since it merely repeats the law as enacted.[9]

As to speed.—An instruction in an action for injuries from the negligent operation of an automobile, that it was negligence to drive the machine on the highway at a "high rate of speed," is objectionable in the use of so

8. Wirthman v. Isenstein, 28 Cal. App. Dec. 465.

Commenting on the same instruction, the supreme court, in a hearing of the same case in that tribunal, agreed that it did not make the defendant an insurer, and said that it merely pointed out his statutory duty as an element to be considered on the general question of negligence. So construed, the instruction was not erroneous. Wirthman v. Isenstein, 182 Cal. 108, 187 Pac. 12.

9. Pemberton v. Arny, 29 Cal. App. Dec. 118, 183 Pac. 356.

indefinite a term, which the jury might interpret as meaning a speed no greater than that allowed by law.[10] And an instruction to the effect that it is illegal to operate a motor vehicle at more than twenty miles an hour where the contiguous territory is closely built up, but that it is for the jury to determine the latter fact, and another instruction that an automobile may be run at a reasonable speed, having regard to traffic, but not at more than thirty miles an hour, are not so conflicting as to be misleading.[11] Where the place in which such a collision occurs is admittedly a congested business street, it is sufficient if the court instructs the jury that in determining negligence it must take into consideration all the facts and circumstances, without specially telling it to consider whether the district was a secluded one having little traffic or a business district with much.[12]

Machines approaching from the rear.—An instruction that an automobile driver has the right to assume that a machine approaching from the rear will be operated with reasonable care, at reasonable speed, and with reasonable caution in giving warning, and may act on that assumption until actually aware of its violation, and if, so relying, he himself exercises ordinary care, he is not liable, where construed in connection with the Motor Vehicle Act[13] requiring drivers before turning or changing course to see that there is sufficient space, and if other vehicles will be affected to give visible or audible signal of his intention, also embodied in the instructions, is not objectionable as relieving the driver of a preceding automobile from responsibility for a collision with a following machine occasioned by both swerving to the left, the last one in an effort to pass the first.[14]

10. Henderson v. Northam, 176 Cal. 493, 168 Pac. 1045.

11. Freiburg v. Israel, 30 Cal. App. Dec. 961, 187 Pac. 130.

12. Collins v. Marsh, 176 Cal. 639, 169 Pac. 389.

13. Stats. 1915, p. 408, § 20, subd. J.

14. Barton v. Studebaker Corp. of America, 31 Cal. App. Dec. 905, 189 Pac. 1025. See supra, § 222, as to imminent peril; supra, § 223,

§ 225. Injuries to Passenger in General.—In an action for injuries to a passenger, an instruction that if plaintiff's injuries were caused by defendant's negligence, and without contributory negligence on the part of plaintiff "or those lawfully in charge of her," she should recover, though less favorable to the plaintiff than she is entitled to, cannot be complained of by the defendant.[15] And where an automobile passenger sues both the driver and a street-car company for injuries arising from a collision, instructions which may present too favorably the driver's right to assume the careful operation of the street-car, cannot prejudice the railway company where the jury in fact found the driver negligent, his negligence not being imputable to the plaintiff.[16] Where, in an action brought by a passenger for injuries in a collision, both owners being made defendants, the court has instructed that the burden was on the defendant, in whose machine plaintiff was a passenger, to free itself from the presumption of negligence which arose against it as a carrier for hire, a further instruction that if the evidence is evenly balanced as to either defendant there can be no recovery against it, cannot be complained of by the other defendant as tending to free the carrier from liability, since its own liability is not in any way conditioned on that of the carrier.[17]

§ 226. Control Over Driver. — Where, in an action against an electric railway company for damages suffered by a guest of the driver of an automobile, the court gives instructions which on the whole correctly state that if the

as to negligent or willful injury; and infra, § 229, as to the law of the road.

15. Wiley v. Young, 178 Cal. 681, 174 Pac. 316 (holding that the mere fact that a passenger in a motor vehicle had previously ridden with the driver some fifteen times without accident has been held insufficient to warrant an instruction based on her knowledge of his careless habit in driving).

16. Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 Pac. 319.

17. Blackwell v. American Film Co., 32 Cal. App. Dec. 937, 192 Pac. 189. See supra, § 179, as to effect of instructions in construing verdict or finding on appeal.

guest had no control over the driver, then only his individual negligence could defeat recovery, such instructions, it has been held, are not rendered erroneous by a clause that it must appear, to sustain the defense of contributory negligence, that it was the personal failure of the plaintiff to exercise ordinary care that caused his injuries.[18] An instruction that the owner of an automobile who was a passenger in it at the time of an accident is not relieved from liability because he failed to exercise control over the driver, if he had the right to do so, is not objectionable where the evidence shows that though having opportunity, he made no attempt to exercise control, his right to do so thus becoming the determining factor.[19] As an instruction that a traveler on a highway approaching a railway crossing must stop in order to look and listen is inapplicable to a passenger in an automobile operated as a public conveyance who cannot stop, its modification in certain respects not affecting its substance in an action by such a passenger cannot be viewed as prejudicial error.[20] Where there is no evidence that the plaintiff either directed or assisted in directing the driver's movements, it is proper to refuse to give an instruction as to the rule of responsibility where the plaintiff does so direct the driver.[1]

§ 227. **Injuries to Pedestrians.**—Where, in an action for damages for injuries to a pedestrian from a backing automobile as he was crossing a street diagonally between cross-walks, the court instructs the jury, that where plaintiff crosses a street where vehicles are numerous it is his duty to look both ways, and that the same duty falls upon the chauffeur in driving backward, it has been held that such an instruction does not mean that a pedestrian must

18. Tousley v. Pacific Electric Ry. Co., 166 Cal. 457, 137 Pac. 31.

19. Randolph v. Hunt, 11 Cal. App. 739, 183 Pac. 358.

20. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

1. Wiley v. Young, 178 Cal. 681, 174 Pac. 316.

look backward nor that he must be continuously looking from right to left. It only means that he must do so where he is subject to danger from either direction. Nor is the instruction objectionable as making the duties of pedestrian and chauffeur the same. It merely declares that the chauffeur should look carefully about before backing his car. And an instruction that in considering the chauffeur's negligence, the jury should take into view the direction in which the car was moving, whether warning was given, the condition of the street, the manner in which the pedestrian crossed, what observation the chauffeur made, and all the facts of the case, has been held proper.[2] An instruction that pedestrians have a right to travel anywhere on a public highway and that it is negligence for a driver to recklessly run upon a pedestrian who has his back to him, which is addressed to an allegation of the complaint and to plaintiff's testimony, is not objectionable as imputing reckless driving to the defendant.[3] It is not error to instruct in the language of the Motor Vehicle Act of 1913, that automobile drivers must use due care and caution in passing standing street-cars, and shall bring their machines to a stop if necessary for the safety of street-car passengers; and also in the language of a city ordinance making obligatory a stop ten feet behind a street-car halted for passengers. There is no conflict in the two provisions. Moreover, the ordinance being operative, the defendant could not be injured by an enunciation of the less rigorous requirement of the statute.[4] In an action by one struck by an automobile when alighting from a street-car, an instruction that the driver had a right to assume that the plaintiff was in full possession of his faculties of sight and hearing unless he had notice to the contrary is properly refused where there is no claim that plaintiff was not in their full possession, or that any

2. Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8.

3. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743.

4. Mann v. Scott, 180 Cal. 550, 182 Pac. 281.

greater duty devolved upon defendant owing to such lack on plaintiff's part.[5]

§ 228. Collisions With Horses or Horse-drawn Vehicles. In an action for injuries from the collision of an automobile with a buggy, an instruction in the language of section 20 of the Motor Vehicle Act that the driver of a motor vehicle approaching a horse-drawn vehicle shall operate his machine "in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse . . . and to insure the safety and protection of any person . . . driving the same," is a proper statement of the law, and is not open to criticism as making the motor-vehicle driver the insurer of the safety of the other driver.[6] Where, in an action by a horseback rider struck by an automobile coming up from behind, the court instructs the jury that if the driver sounded an alarm which would have been heard by a person of ordinary hearing, "and the defendant . . . believed that plaintiff had ordinary hearing," and that the driver could not turn out because of the condition of the road, then he had the right to presume that the horseback rider would turn out, etc., is properly modified by the insertion of the quoted phrase, which is not objectionable as requiring the automobile driver to prove affirmatively that he believed the horseback rider had ordinary hearing, the fact being that the rider was deaf.[7]

§ 229. Law of the Road.—While it is the duty of the court to state to the jury all the conditions to which the law subjects both parties with respect to the performance of the duties imposed, an instruction which, after correctly summarizing the law of the road as laid down by the Motor Vehicle Act of 1905, amended in 1907, namely, that

5. Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078. See supra, § 222, as to imminent peril.

6. Freiburg v. Israel, 30 Cal. App. Dec. 961, 187 Pac. 130. See supra, § 120.

7. Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58.

vehicles overtaking others shall pass to the left while the driver of the vehicle to be passed must, as soon as practicable, turn out to the right, tells the jury that if plaintiff, while free from negligence, was riding along the right-hand side of the road, and defendant, overtaking him, attempted to pass to the right, and so collided with and injured plaintiff, then the latter should recover, without further mention of plaintiff's statutory duty to turn out to the right, is not ground for reversal, where, in other portions of the charge, the court frequently referred to the duty of the driver of a vehicle overtaken by another to turn out, as soon as practicable, to the right, and in particular instructed: "It is as much the duty of a person riding a bicycle on a public road, on being approached from behind by another motor vehicle to seasonably turn to the right so as to permit the approaching vehicle to pass him at the left, as it is for the latter to turn to the left to go by."[8] Where the only negligence proved by the plaintiff was that defendant's chauffeur violated a city ordinance in driving on the left-hand side of the street, and the court instructed that if the right-hand side was obstructed, the chauffeur was not obliged to abandon the street but might use the left-hand side without being chargeable with negligence in so doing, the theory of unavoidable accident, so far as it was applicable, was sufficiently presented to the jury, and the refusal of specific instructions on that theory was not erroneous.[9]

§ 230. Collisions at Street Intersections in General.—An instruction with reference to the duty of an operator to have his automobile on the right-hand side of the roadway and under control when approaching a street intersection, which follows the language of the Motor Vehicle Act itself, is not objectionable.[10] Where a legal limit of

8. Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323.

9. Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37.

10. Wirthman v. Isenstein, 28 Cal. App. Dec. 465.

ten miles per hour is put upon automobiles approaching street intersections where the view is obstructed, and there is no dispute about the view being so obstructed at the crossing where a collision occurred, it is proper for the court to instruct that if either driver approached the crossing at a greater speed he was guilty of negligence, as the court in its instructions is allowed to state the testimony on a matter of fact upon which there is no dispute and as to which the testimony is unconflicting and substantial.[11] It is not error to refuse to instruct that an automobile driver approaching a cross-road where the view is obstructed has the right to assume that another driver coming along the intersecting highway will pass to the right of the center of the intersection before turning to the left, as required by law, where the driver himself was violating the law by traveling at a speed of more than twenty miles an hour, since the instruction, though abstractly correct, might, under the circumstances, have misled the jury. The refusal to instruct that the jury should determine at what distance from a highway intersection an automobile driver should reduce his speed to ten miles an hour in order to comply with the Motor Vehicle Act, requiring him to do so where the view is obstructed, has been held to be harmless error, inasmuch as any intelligent jury must understand without being told that it is incumbent on them to make such a determination in view of all the circumstances of the case before they could correctly appraise the driver's possible negligence. Such a refusal is also harmless where the evidence shows merely that the driver attempted to reduce his speed, but not that he succeeded in doing so. Nor is an instruction to find for the defendant if the plaintiff "approached the intersection at more than ten miles an hour" objectionable as taking from the jury the question of

11. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713.

plaintiff's distance from the intersection when maintaining a greater speed.[12]

§ 231. Right of Way at Intersections.—An instruction that the driver of an automobile approaching a street intersection on a street going northerly would, "all other things being equal," have the right of way, means no more than that he would have the right of way provided he was near enough to the intersection to put the rule as to right of way as laid down by statute into operation, and hence is not objectionable. Where such an instruction has been given, a further instruction that the right-of-way rule does not apply unless the vehicle were approaching at or near the same time, is properly refused.[13] An instruction that the failure of an automobile driver approaching intersecting highways to yield the right of way to another machine coming from his right is negligence, and, if the proximate cause of the collision, precluded his recovery, though erroneous, has been held to have been cured by a further instruction that the question of such negligence was to be determined on all the facts and circumstances of the case.[14]

§ 232. Collisions at Electric Railway Crossings in General.—Under the general rule applicable to negligence cases, that the question of one's due care at a particular time is to be determined solely by what took place, and that his general reputation for carefulness, or character as to competency, is not in issue, it is error to instruct that a street-car company, sued for injuries due to a collision of its car with an automobile, was under the duty of employing competent and careful persons to manage its cars, and that it was the motorman's duty to exercise proper care, and keep a proper lookout, etc., and that "the de-

12. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

13. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713.

14. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

fendant would be liable for any injury proximately caused by its failure in these respects," the quoted clause, though emphasizing the necessity of proximate causality, not being sufficient to cure the error, the natural effect of testimony as to the motorman's incompetency being to lead the jury to infer that he acted improperly on the particular occasion in question.[15] In an action by the driver of an automobile for injuries sustained in a collision with a gasoline motor car operated by a railroad company over its tracks in a city street where it had no exclusive rights, an instruction that neither party had an exclusive right to the use of the streets at the intersection where the accident happened, nor any right superior to the other, and that each would be obliged to take reasonable precaution to avoid a collision, when taken in connection with another instruction that the railroad company's car would have the preference in crossing first, is not erroneous. And it has been held that an instruction that both parties had a lawful right to pass over the intersection and to require reasonable care and caution of those traveling on the other road to avoid collision, is not objectionable as declaring that the plaintiff had the right to be negligent and charge the consequences to the defendant.[16] Where there is ample evidence to support the theory that a collision between an automobile and a street-car was caused by the negligence of the automobile driver, and also the opposite theory that it was occasioned by the motorman's negligence, any substantial error in the instructions must be regarded as prejudicial.[17]

§ 233. Duty of Motorman.—An instruction that it is the duty of drivers of street-cars to have their power under control, and so use the control as to avoid injury "whenever possible," puts too stringent an obligation

15. Langford v. San Diego Elec. Ry. Co., 174 Cal. 729, 164 Pac. 398.
16. Bidwell v. Los Angeles etc. Ry. Co., 169 Cal. 780, 148 Pac. 197.
17. Langford v. San Diego Electric Ry. Co., 174 Cal. 729, 164 Pac. 398.

upon the motorman, whose duty is only to exercise ordinary care.[18] An instruction that a motorman, running with due care and at a proper speed, has a right to assume that others using the street will exercise due care "and will see that which is plainly to be seen," is not objectionable as assuming that the street-car could be plainly seen, but merely says that if it was plainly to be seen, the motorman had a right to assume that plaintiff would see it, the question of visibility being left to the jury.[19] Refusal of an instruction that the duty of taking added precautions is not cast on the motorman by the mere sight of an automobile, but that he has the right to assume that it will stop before attempting to cross the track, is not prejudicial where the jury are told that recovery must depend on proof of negligence in operating the electric train at excessive speed and in failing to give warning, as alleged in the complaint. And especially is this true where the refused instruction is covered by another that those in charge of railway cars are not compelled to stop for an approaching automobile where there is nothing to indicate that its driver is unable to stop before going on the crossing, or that he does not see the train.[20] Any error in refusing to instruct that it is the duty of a motorman operating a street-car in a populous or much traveled portion of a city, on approaching a street crossing at a rapid speed, to give reasonable warning, is cured by instructing that it is the motorman's duty to keep a close lookout, and use such reasonable precautions at crossings where his view is obstructed, as the circumstances may require. An instruction that a motorman approaching a street crossing and seeing an automobile coming toward the street-car tracks is not obliged to slacken speed until he is aware, or, exercising ordinary

18. Langford v. San Diego Electric Ry. Co., 174 Cal. 729, 164 Pac. 398.

19. Busch v. Los Angeles Ry. Co., 178 Cal. 536, 2 A. L. R. 1607, 174 Pac. 665.

20. Ellis v. Central California Traction Co., 37 Cal. App. 390, 174 Pac. 407.

care, should be aware, that the automobile, before being able to stop or turn, will come into dangerous proximity to the tracks, but may assume that the automobile will be so operated as to avoid accident, is not a statement of the last clear chance doctrine, for that doctrine only applies after the motorman becomes aware of the automobile's peril, whereas such an instruction covers the time previous to such apparent peril. Thus construed, the instruction is a correct statement of the law. Nor is it objectionable as relieving the motorman of the duty to slacken speed until he sees the collision will be inevitable, the distinction between dangerous proximity to the tracks and inevitable accident being obvious.[1]

§ 234. Collisions at Steam Railroad Crossings.—Where in an action for injuries to occupants of an automobile at a railroad crossing the evidence is conflicting as to whether the crew of an approaching train sounded the whistle or rang the bell, an instruction that the driver of the automobile "had the right to assume, until he reached a point where he could look up and down the track, that no train was approaching the crossing, because there was no sound of an engine, bell or of a whistle," invades the province of the jury, and is erroneous.[2] Although an instruction that an automobile driver approaching a railroad track may rely on the presumption that the railroad company will do its duty, and will not be chargeable with contributory negligence in failing to anticipate its negligence, may be erroneous, yet where the correct rule that he cannot rely on the whistle of an approaching train being blown or bell sounded, or lights displayed, but must approach the track notwithstanding the absence of these warnings with his machine under such control that it can be stopped if necessary to avoid danger, is so reiterated and impressed on the jury that it must have preponder-

1. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119.

2. Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21.

ated in their minds and in their determination of the case, the error is not ground for reversal.[3] An instruction that if a railroad company suffered a line of cars to remain on a switch-track, obscuring a motorcycle rider's view of the main-line track "when about to go upon such track," he would be excused from looking for trains, has been held to be erroneous where the evidence showed that after passing the line of cars, and while still thirteen feet from the main line, he had an uninterrupted view of the track for a distance of three miles.[4]

§ 235. Necessity for Instruction on Proximate Cause.— Applying the general principle heretofore laid down, that to sustain a recovery for negligence per se it must be shown to have been the proximate cause of injury,[5] it is a general rule that the court should instruct the jury that, before a recovery in such case is sustainable, the act of the defendant in violating such law was the proximate or direct cause of the tort or injury.[6] Consequently it has been held that an instruction that a chauffeur who backs his car, while on the wrong side of the street for travel in that direction, in an effort to park it, without giving signals or warning, is negligent, is improper where it does not also appear that the failure to give such signals or warnings was the cause of the injury.[7]

§ 236. Form of Instruction as to Proximate Cause.— While it is the proper procedure to instruct the jury that a violation of an ordinance or statute must have been the proximate cause of the injuries alleged to have been sustained, to entitle to a recovery in an action for damages

3. Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 Pac. 1117.

4. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36.

5. See supra, § 157. And see NEGLIGENCE.

6. Mann v. Scott, 180 Cal. 550, 182 Pac. 281; Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323. See infra, § 236, as to the form and sufficiency of such an instruction.

7. Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8. See supra, § 222, as to imminent peril excusing mistake so that it cannot operate as proximate cause.

for the negligent operation of a motor vehicle,[8] it is sufficient if, from the instructions taken as a whole, it is shown that the jurors were fully advised as to the necessity for finding that plaintiffs' injuries resulted from defendants' conduct as the proximate cause thereof.[9] Hence, when an instruction correctly states the law of the road as laid down by statute, and declares that a party violating it is liable for injuries taking place by reason of or through such violation, provided the injured party is free from contributory negligence, a defendant who did not request a fuller or more specific statement as to the element of proximate cause will not be heard on appeal to complain of the instruction as given.[10] And an instruction that if an automobile driver's failure to give a warning signal when approaching a buggy from behind, as required by law, was "a" proximate cause of the ensuing accident, plaintiff should recover in the absence of contributory negligence, is not objectionable.[11]

In a case where the instruction on proximate cause related to the negligence of joint tort-feasor to the "accident," instead of to the "injuries" of plaintiff, it was held that this was not objectionable on the theory that the negligence of one might have caused the accident and that of the other, the injuries.[12]

§ 237. Failure to Instruct in Terms.—Where other instructions fully cover the point, or where, on the case postulated in the instruction, a finding of proximate cause is impliedly required, a failure to require in terms a finding on the issue is not error.[13] Thus, in an action

8. See supra, § 235.

9. Mann v. Scott, 180 Cal. 550, 182 Pac. 281.

10. Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323.

11. Freiburg v. Israel, 30 Cal. App. Dec. 961, 187 Pac. 130.

12. Blackwell v. American Film Co., 32 Cal. App. Dec. 937, 192 Pac. 189.

13. Wirthman v. Isenstein, 182 Cal. 108, 187 Pac. 12 (affirming opinion in 28 Cal. App. Dec. 465; Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781; Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323; Fenn v. Clark, 11 Cal. App. 79, 103 Pac. 944).

growing out of a collision of automobiles at a highway intersection, an instruction to find for defendant if plaintiff approached the intersection at more than ten miles an hour has been held not objectionable as taking from the jury the question of proximate cause, where that matter was sufficiently covered in other instructions.[14] And when the court, after instructing as to negligence and contributory negligence, and as to the meaning of the phrase "proximate cause of injury," instructs that to find for plaintiff the jury must find defendants guilty of negligence in some particular "as alleged in the complaint"; and the complaint itself alleges that defendant's negligence was the proximate cause of plaintiff's injury, the failure to instruct in terms that defendant's negligence must have been the proximate cause of injury is not reversible error.[15] And an instruction which, after correctly stating in abstract terms the law of the road, proceeds to make a concrete application of the law to the cause on trial by instructing that if the jury find that plaintiff, while free from negligence, was riding along the right-hand side of the road, and the defendant, on overtaking him, attempted to pass to the right and in so doing collided with and injured plaintiff, then defendant was negligent, and plaintiff was entitled to judgment, has been held not objectionable as failing to require the jury to find that defendant's negligence was the proximate cause of the injury, there being, on the facts as predicated, no other solution of the accident.[16]

§ 238. Last Clear Chance Doctrine in General.—An instruction that a horseback rider sitting sidewise on his mount cannot recover against the driver of an automobile for a collision, "unless defendant knew of the situation of

14. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

15. Wirthman v. Isenstein, 182 Cal. 108, 187 Pac. 12 (adopting the opinion of the court of appeals, 28 Cal. App. Dec. 465, on this phase of the case).

16. Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323.

plaintiff and realized that he might inflict injury upon plaintiff by driving his automobile as he did, but nevertheless recklessly took a chance upon so doing while having the ability to avoid the accident, if he had such ability," has been held to be a sufficiently clear statement of the last clear chance doctrine.[17] Where there is no evidence that an automobile collision was brought about intentionally by the defendant, and such an assumption is very improbable, the fact that the court in charging in the "last clear chance" doctrine stated that defendant's failure to avail himself of that chance should have been "willful" in order to render him liable, will not be deemed prejudicial, if, under the circumstances, it could not have misled the jury.[18] And an instruction applying to the acts of an injured pedestrian the last clear chance doctrine in favor of the owner of the automobile which collided with him, if wholly irrelevant to the case, cannot be viewed as prejudicial.[19] But where an instruction on the last clear chance doctrine was based on the assumption which there is no evidence to support that plaintiff's intestate, on approaching a steam railroad on his motorcycle, found himself in a position of peril from which he could not extricate himself "through fear, excitement, a loss of self-control," is erroneous.[20]

§ 239. Covering Doctrine in Other Instructions.—An instruction in a suit growing out of an automobile collision at a highway intersection that if plaintiff approached the intersection at more than ten miles an hour the jury should find for defendant is not objectionable as taking away from them the question of liability under the last clear chance doctrine, assuming that that question has been fully covered in other instructions.[1] In an action for injuries

17. Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58.

18. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

19. Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 Pac. 342.

20. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36.

1. Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781.

to occupants of an automobile from collision with a street-car, an instruction that if the driver of the automobile saw the street-car in time to have avoided the accident by ordinary care, then the motorman's failure to ring the bell "at any time" was immaterial, as the "only" purpose in doing so would be to apprise the driver of the car's approach, is not objectionable as taking from the jury the right to hold the street-car company liable for failure to exercise its last clear chance to prevent the collision through the motorman's waste of time in ringing the bell, the last clear chance doctrine and its applicability to the facts being fully covered by other instructions, and the facts also showing that the discovery of the car by the driver of the automobile and the motorman's ringing of the bell were simultaneous.[2]

§ 240. Requirement of Actual Knowledge of Plaintiff's Peril.—In obedience to the general rule discussed elsewhere, that only actual knowledge of plaintiff's peril will charge defendant under the last clear chance doctrine,[3] an instruction on this doctrine must require such knowledge.[4] Thus, an instruction that if the motorman of a street-car approaching an automobile stalled on the tracks was "in a position to be aware" of the danger of a collision and yet did not use ordinary care to prevent it, negligence of the occupants of the automobile in getting into a position of danger would not be a defense to the street-car company, is erroneous as a statement of the last clear chance doctrine.[5] So, also, is an instruction rendering defendant liable under the doctrine if he saw "or in the exercise of ordinary care should have seen," plaintiff's perilous situa-

2. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119.

3. See supra, § 166.

4. Collins v. Marsh, 176 Cal. 639, 169 Pac. 389; Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119; Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709; Quackenbush v. Los Angeles Ry. Corp., 28 Cal. App. 173, 151 Pac. 755.

5. Quackenbush v. Los Angeles Ry. Corp., 28 Cal. App. 173, 151 Pac. 755.

tion. But where the defendant motorist himself testifies that he did see it, the error is harmless.[6] But the error is not harmless where the instruction charges a motorman with negligence, under the doctrine, if "by the exercise of reasonable care" he should have seen the dangerous situation of an automobile approaching the tracks, though he did in fact see it when he was two hundred and fifty feet away from the crossing and when it was not yet in peril, since, in such case, the motorman had the right to assume that it would be so operated as to avoid a collision. He was not obliged to know, as the instruction implied, that it would keep on without stopping till it reached the crossing.[7] On the other hand, it is not error to modify a requested instruction that when a motorman sees, "or in the exercise of reasonable care ought to see," that an automobile is in a place of peril, it is his duty to use reasonable care to avoid an accident, etc., by striking out the quoted phrase, even though the instruction be viewed as something other than a statement of the last clear chance doctrine, the instruction still remaining a correct statement of law and the motorman's general duty to keep a lookout being covered by other instructions, and the undisputed fact being that he did see the machine in time to act.[8]

§ 241. Burden of Proof.—An instruction that the contributory negligence of a passenger in a motor bus operated as a common carrier will not be presumed from the fact of injury, but, on the other hand, the burden of proving such negligence, and also the defenses of inevitable accident and negligence of a third person, is on the defendant carrier, is not erroneous as requiring the defendant to prove these defenses by the preponderance of evidence, the phrase "burden of proof" in the connection meaning

6. Collins v. Marsh, 176 Cal. 639, 169 Pac. 389.

7. Thompson v. Los Angeles etc. Ry. Co., 165 Cal. 748, 134 Pac. 709.

8. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 158 Pac. 119. See supra, § 233, as to defendant's duty before last-clear chance doctrine applies.

no more than the burden of meeting the passenger's prima facie case as made out by the injury. And especially is this true where in other instructions the court correctly tells the jury that the passenger must prove his case throughout by a preponderance of the evidence.[9] Though the burden of showing contributory negligence is on the defendant, an instruction that contributory negligence "is not to be inferred from the evidence offered by the plaintiff" is erroneous.[10]

§ 242. Consideration of Evidence by Jury.—In a case where plaintiff and three of her witnesses testified that she was struck by defendant's automobile as she was alighting from a street-car, and defendant and three of his witnesses testified that the automobile was not moving but was standing still several feet away, and that plaintiff fell in front of it, so direct a conflict is presented as to make proper an instruction that a witness false in one part of his testimony is to be distrusted in others, within the code provision that the jury are to be so instructed "on all proper occasions." But where it is apparent from the verdict that the jury did not believe defendant's story, and it is impossible, in consequence, to perceive how his substantial rights could have been prejudiced by the refusal of the instruction, as the verdict would necessarily have been the same had it been given, the error in its refusal will not be deemed ground for reversal.[11] The driver of an auto truck whose negligence in its operation is alleged to have caused a collision with a bicycle rider is so far interested in the event of an action therefor against his employer that an instruction directing the attention of the jury to the fact that he is "interested on his side of the case," as a circumstance bearing on her credibility, is not, it has been held, improper. Nor is

9. Learned v. Peninsula Rapid Transit Co., 33 Cal. App. Dec. 264, 193 Pac. 591. See CARRIERS.

10. Young v. Southern Pac. Co., 59 Cal. Dec. 283, 459, 190 Pac. 36.

11. Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078.

such an instruction objectionable as tending to discredit defendant's only eye-witness to the accident, where attention of the jury is similarly directed to plaintiff's interest in the case as also bearing on his credibility.[12] An instruction that testimony to the effect that the owner of an automobile, of which he was an occupant at the time of an accident, had loaned it to the driver, did not destroy the presumption of his responsibility arising from his ownership, unless it was believed by the jury, that they were the exclusive judge of the evidence, and that if they did not believe the testimony as to the loan they should hold the owner liable, is not objectionable as assuming that such testimony was false.[13] An instruction in an action for injuries to a passenger in an automobile from a collision with a street-car, that the question of plaintiff's contributory negligence is to be determined from "all" the evidence, is proper. The jury is required to pass on all the evidence in arriving at a verdict.[14]

V. CRIMES AND PUNISHMENT.

§ 243. Violations of Laws Governing Operation in General.—It is no defense to an automobilist charged with using a device on the headlights of his machine that had not been tested, approved and certified by the testing agency of the state motor vehicle department, as required by section 13 of the Motor Vehicle Act, that the device did not in fact produce a dangerous glare, blinding and imperiling those in front of his car.[15] In a prosecution for violating the provision of the Motor Vehicle Act against traveling at an unsafe and unreasonable speed, the question whether the speed in question is unreason-

12. Konig v. Lyon, 33 Cal. App. Dec. 67, 192 Pac. 875.

13. Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

14. Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 Pac. 319.

15. Ex parte Hinkelman, 60 Cal. Dec. 123, 191 Pac. 682. See supra, § 15, as to validity and interpretation of provisions governing brakes and headlights.

able and unsafe is for the jury.[16] The offense created by a municipal ordinance making it a misdemeanor to drive a vehicle through the streets at more than thirty miles an hour is complete without any showing of intent.[17]

§ 244. Failure to Stop After Accident.—The Vehicle Act, in section 21, contains a provision which may be summarized as follows:

"Whenever an automobile . . . strikes any person, or collides with any vehicle containing a person, the driver . . . shall . . . stop, render . . . all necessary assistance including the carrying of such person or occupant to a physician or surgeon . . . if such treatment be required, or if such carrying be requested," etc.

The driver, and anyone having authority over him, are further required to give names, number of vehicle, etc. The violation of the section is made a felony or misdemeanor in the discretion of the court. In discussing the intent and operation of this law, the court of appeal has said:

"The purpose and propriety of the act are apparent: It was designed to prohibit, under pain of severe punishment, negligent or wanton drivers of motor cars from seeking to evade civil or criminal prosecution by escape before their identity could be established, and similarly to prohibit all drivers, whether negligent or not, from leaving persons injured in collisions with cars driven by them, in distress and danger for want of proper medical or surgical treatment. It was not designed to be used as a club to exact monetary settlement for injuries either to persons or property. One of two automobile drivers who may have been equally negligent in bringing about a collision in which neither driver was injured, by first demanding that he be carried to a hospital or surgeon, could not by the expedition of his demand put the stamp of felony upon the other, who might refuse the request

16. Ex parte Daniels, 60 Cal. Dec. 269, 192 Pac. 442.

17. Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724 (holding that such a case falls within the provisions of Pen. Code, § 20). See supra, § 118, as to criminal assault with automobile.

made in the terms of the statute, but made in bad faith."[18]

§ 245. Larceny of Automobile.—In the larceny of an automobile, the corpus delicti consists in the asportation of the machine.[19] Under the rule that to constitute the crime of larceny the original taking must involve a trespass or be done with felonious intent, an accused who, being then the owner of two automobiles, pledges them to secure an indebtedness and evidences the pledge by the delivery of a bill of sale, but who retains possession of the machines at his garage with the creditor's consent, and afterwards exercises acts of ownership over them and even sells one of them without serious protest on the part of the creditor, cannot be convicted of grand larceny for selling the second machine, his offense, if any, being that of embezzlement, which involves a breach of trust and wrongful conversion of property, the possession of which was lawfully obtained. Nor is the case altered by the fact that shortly after the making of the pledge in question, the creditor rented of the accused a particular corner of the latter's garage and placed the two machines in that corner, such act being insufficient to transfer possession of the automobiles from accused to the creditor, or to terminate accused's custody of them.[20]

§ 246. Jurisdiction and Venue.—Under the provision of the Penal Code giving justice's courts jurisdiction of certain public offenses committed within the several counties in which they are established, including all misdemeanors punishable by a fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or

18. People v. Kaufman, 33 Cal. App. Dec. 338, 193 Pac. 953 (per Brittain, J.). See supra, § 16, as to validity of provision requiring motorists to stop. See supra, § 204, as to proof of refusal to stop and give name in action for negligent injury.

19. People v. Cahill, 11 Cal. App. 685, 106 Pac. 115. See LARCENY.

20. People v. Knox, 32 Cal. App. 158, 162 Pac. 407.

both, and the provision of section 32 of the Vehicle Act fixing a punishment for its violation, except when otherwise provided, of a fine of not more than five hundred dollars, or imprisonment in the county jail of not more than six months, or both such fine and imprisonment, a justice court has jurisdiction of a violation of the speed limits fixed by the act.[1] Though the Motor Vehicle Act provides that any person arrested for violating the speed limits therein fixed, unless he shall demand that he be taken forthwith before the most accessible magistrate, shall be given a notice by the arresting officer in writing to appear before a designated magistrate at least five days subsequently, and upon the prisoner's written promise to so appear he shall be released,[2] yet on reveiw of a justice's judgment of conviction for violating the speed law, in habeas corpus proceedings, which are not designed to correct mere errors but reach only judgments which are absolutely void, the fact that the record fails to show affirmatively that the justice was the most accessible magistrate, and that the defendant on his appearance before the justice on the day of his arrest and sentence waived his right to the five days' interval between arrest and trial provided by the statute, will not entitle the defendant to release. A judgment of conviction cannot be held void on its face because of these irregularities, especially where it recites that on the day of his arrest the defendant appeared before the court, and, having been informed of all his legal rights, and the complaint having been read to him, pleaded guilty; and where it further appears that the defendant afterward appealed from the conviction to the superior court, which affirmed the justice's judgment. The right to be taken forthwith before the most accessible magistrate, and the

1. In re Turck, 37 Cal. App. 601, 174 Pac. 100; Albers v. Superior Court, 30 Cal. App. 772, 159 Pac. 453.

2. Stats. 1917, p. 404, § 22, subd. c (this provision, with changes immaterial to the question here considered, was carried forward into the present—1919—version of the act).

alternative right to a five days' interval between arrest and trial, are rights which may be waived, and their denial is merely error to be corrected on appeal, and does not go to the jurisdiction of the justice's court.[3]

§ 247. Complaint or Information.—A complaint charging the violation of an act governing the use of automobiles on public highways, which fails to aver that the defendant used or operated his automobile on a public highway, fails to state a public offense.[4]

A criminal complaint charging that defendant used on his automobile headlights a device known as the "Warner lens," which had been tested by the testing agency of the state motor vehicle department, as required by section 13 of the Motor Vehicle Act, and approved and certified as required by the act when used with light bulbs of a specified candle-power, but that defendant used such device with light bulbs of a higher candle-power, charges in effect that defendant used a device not approved and certified by the state testing agency, and sufficiently alleges a violation of the statute. A further allegation that defendant was using a "diffusing type of lens," the use of which is permitted only under certain conditions, is sufficiently definite, the meaning of the quoted phrase being a matter to be proved at the trial.[5] The fact that an information charging a felony under the Penal Code,[6] in failing to stop an automobile to render assistance to and procure medical aid for a person struck, also charges acts constituting a mere misdemeanor under the Motor Vehicle Act of 1913,[7] in failing to give name and address and number of machine under such circumstances, is a defect in pleading to be corrected by the interposition of a de-

3. In re Turck, 37 Cal. App. Dec. 601, 174 Pac. 100.

4. Matter of Application of Worthington, 21 Cal. App. 497, 132 Pac. 82.

5. Ex parte Hinkelman, 60 Cal. Dec. 123, 191 Pac. 682.

6. Pen. Code, § 367c (before the incorporation of this provision in the Motor Vehicle Act itself).

7. Stats. 1913, p. 649 et seq., § 21.

murrer, failing which the defendant cannot complain for the first time on appeal that the information charged both a misdemeanor and a felony.[8]

§ 248. Trial.—A jury cannot be said to have received evidence out of court in a prosecution for stealing an automobile, merely because the court, with the consent of counsel on both sides, made an order for the inspection of the machine, and the inspection was had near the courthouse, in the presence of the judge, counsel and court stenographer, and under the judge's control, the jury being in charge of an officer as required by the Penal Code.[9] A remark by the district attorney to the jury in arguing a prosecution for the larceny of an automobile, that defendant's transferee, from whose possession the machine was recovered, had made no attempt to reclaim it, has been held to be within the limits of legitimate argument, as it tended to discredit the transferee's story that he had purchased the car two weeks before the theft. The further remark that defendant had sat during the trial taking down testimony and instructing his counsel, and yet had not produced a single witness to explain where the machine which had been in his possession came from, was, likewise, not improper, and could not be construed as a reference to the fact that defendant did not take the stand.[10] Though a question put by the district attorney to a witness in a prosecution for failing to stop after an accident as to whether he had heard that defendant had been under police investigation for selling stolen automobiles, constitutes misconduct, yet where objection was sustained and defendant failed to request any instruction, it will not cause a reversal of a conviction, the court itself having instructed that insinuations in questions asked witnesses are not evidence and must be disre-

8. People v. Finley, 27 Cal. App. 291, 149 Pac. 779.

9. People v. Cahill, 11 Cal. App. 685, 106 Pac. 115.

10. People v. Miller, 31 Cal. App. Dec. 206, 188 Pac. 52.

garded. The jury will be presumed to have heeded such an admonition. Nor can prejudicial misconduct be based on a question asked a witness as to whether he had heard that, on the day of the accident, the defendant was visiting one who had been arrested as a member of the "Black Hand," the witness answering "No," the offer of the court to strike out the matter not being accepted by the defense, no instruction asked, and, though the question was assigned as misconduct, no question as to the district attorney's good faith being raised.[11]

§ 249. Evidence in General.—The court cannot take judicial notice of the meaning of the phrase "diffusing type of lens," as used in section 13 of the Motor Vehicle Act, permitting the use of such a lens on automobile headlights under certain conditions, "the phrase not having, as yet (July, 1920), come into sufficiently general use."[12] The burden is on the accused to explain his possession of a stolen automobile.[13] Under the rule that where an accused commits two offenses at the same time and place, so that they constitute the same or approximately the same transaction, evidence of the crime not charged is admissible if it tends to show motive or any other fact relevant to the crime charged, the testimony of the owner of a stolen automobile that a pair of gloves found in the defendant's possession is the same pair he left in the automobile when he placed it in the garage on the night of the theft is admissible as tending to connect the defendant with the larceny of the machine.[14] In a prosecution for failing to stop and render assistance to those injured after an accident, it has been held that evi-

11. People v. Fodera, 33 Cal. App. 8, 164 Pac. 22.

12. Ex parte Hinkelman, 60 Cal. Dec. 123, 191 Pac. 682.

13. People v. Carnes, 33 Cal. App. Dec. 121, 192 Pac. 1088. See supra, § 34, as to amount of proof necessary to prove larceny in a civil action. See LARCENY.

14. People v. Cahill, 11 Cal. App. 685, 106 Pac. 115. See CRIMINAL LAW.

dence of defendant's violation of the speed laws on other occasions is inadmissible.[15]

§ 250. Cross-examination and Redirect Examination.— In a prosecution under the provisions of section 21 of the Motor Vehicle Act, making it a felony for an automobile driver not to carry a person injured in a collision with his car to a physician, if he so requests, where the testimony discloses animus on the part of the complaining witness and a purpose to use the statute as a means of extortion, it is error not to permit his full cross-examination as to the details of a physical encounter had by him with a third person shortly before the collision, in which the injuries attributed by him to the collision might have been received, such cross-examination bearing directly on the question of his credibility.[16] Any error in permitting character witnesses to be asked whether they had heard of defendant having been arrested for and pleading guilty to a number of violations of the speed laws is without prejudice where no instruction was asked for the jury to disregard the evidence and the good faith of the prosecutor was not questioned. Likewise, the impropriety of an offer of a docket of a justice for the purpose of showing violation of the speed laws by defendant, to which the court sustained an objection, and as to which no assignment of misconduct was made or instruction to the jury asked, will be deemed cured by the court's voluntary instruction that offers of evidence rejected by the court, and testimony stricken out should be disregarded.[17] In a prosecution for the larceny of an automobile, a question asked defendant's witness on cross-examination as to whether he knew defendant was living with a woman not his wife, replied to in the negative, and, though objection

15. People v. Fodera, 33 Cal. App. 8, 164 Pac. 22. See supra, § 204, as to proof of refusal to stop and give name in action for negligent injury.

16. People v. Kaufman, 33 Cal. App. Dec. 338, 193 Pac. 953.

17. People v. Fodera, 33 Cal. App. 8, 164 Pac. 22.

was promptly sustained, not thereafter alluded to or assigned as misconduct, cannot be complained of on appeal.[18] In a case where the defendant in whose possession a stolen automobile was found claimed to have received a bill of sale for it from a certain person, redirect examination of defendant as to how he was dressed on the occasion of the execution of the instrument is on an immaterial subject.[19]

§ 251. Weight and Sufficiency of Evidence to Establish Larceny.—The recent unexplained possession of a stolen automobile is a circumstance tending to show guilt.[20] Though not of itself sufficient to convict, it may sustain a conviction, when taken with other evidence, if it produces in the minds of the jury the requisite degree of moral certainty. Where the owner of a stolen automobile points out the marks of identification upon the car recovered from the transferee of the defendant, and swears that he knows absolutely that it is his machine, the evidence of identity is sufficient in this respect to support a verdict of guilty.[1] Evidence in a prosecution for grand larceny of an automobile that the owner placed it in a garage one evening and the next morning it was mysteriously missing, no one connected with the garage appearing to know where it was or when or by whom it had been taken away, there being no pretense that it had been taken with the consent either of the owner or the manager of the garage, sufficiently establishes the corpus delicti.[2]

Where the owner left his car standing in a city street and fifteen minutes later found it gone, and it was next located in a private garage in another county, where defendant had stored it, having removed and concealed cer-

18. People v. Carnes, 33 Cal. App. Dec. 121, 192 Pac. 1088.

19. People v. Carnes, 33 Cal. App. Dec. 121, 192 Pac. 1088.

20. People v. Carnes, 33 Cal. App. Dec. 121, 192 Pac. 1088; People v. Miller, 31 Cal. App. Dec. 206, 188 Pac. 52. See LARCENY.

1. People v. Miller, 31 Cal. App. Dec. 206, 188 Pac. 52.

2. People v. Cahill, 11 Cal. App. 685, 106 Pac. 115.

tain parts under the sidewalk, painted over the number of the motor, and removed the license plates and endeavored to secure others, and where defendant gave contradictory and unsatisfactory explanations of his possession of the machine, the evidence is sufficient to sustain a conviction of larceny, though a notary testifies that a certain individual not produced at the trial signed a bill of sale to defendant for the machine in his presence.[3] So, the possession of a stolen automobile by defendant shortly after the larceny, the discovery of certain of its equipment in his garage for which other parts had been substituted, testimony that he was seen with a similar machine in the vicinity of the theft shortly after the larceny, coupled with his silence when arrested and entire failure to offer any explanation of how he came by the machine, have been held to be sufficient circumstances to identify defendant as the thief and sustain a verdict of guilty.[4] And evidence that defendant was seen in the garage where the machine was placed, early in the morning of the day it was missed, that he was found with the machine in his possession a month later, and that in explanation of his possession he stated that he had been driving it for a couple of weeks for a lady in F., who, on investigation, turned out to be his mother-in-law and who stated that she got the car by exchange and that it was defendant who made the exchange, has also been held sufficient to sustain a verdict of guilty.[5]

§ 252. Sufficiency of Evidence to Establish Failure to Stop After Accident.—Evidence that defendant, a little after sunset, was driving his automobile, in which were four companions, along a public highway at a speed of forty miles an hour, that he turned out to pass another automobile going in the same direction and in so doing

3. People v. Carnes, 33 Cal. App. Dec. 121, 192 Pac. 1088.

4. People v. Miller, 31 Cal. App. Dec. 206, 188 Pac. 52.

5. People v. Cahill, 11 Cal. App. 685, 106 Pac. 115.

collided with a motorcycle coming from the opposite direction with an impact of such force as to be heard by the occupants of the other automobile, a closed car, and by another person a hundred yards away, and to bend and indent the fender and tool-box of defendant's machine and to spatter the machine and the coat of one of the occupants with the blood and brains of one of the two riders of the motorcycle, whose body was carried by the automobile forty-five to sixty feet; that defendant did not stop but rather increased his speed; and that when an attempt was made to notify him of the accident at a town farther along the road, he did not return to the scene but continued his journey, amply sustains a conviction under the provision of the Penal Code making it a felony for the driver of an automobile involved in a collision not to stop and render assistance to persons injured, since it negatives the defense that defendant had no knowledge of the accident.[6]

§ 253. **Instructions.**—An instruction, in a prosecution for the larceny of an automobile, that accused is presumed to be innocent, and in case of doubt whether his guilt is "satisfactorily shown" is entitled to an acquittal, and that if the jury is "satisfied" beyond all reasonable doubt of his guilt it will so declare, is proper, being the full equivalent of requiring the prosecution to establish defendant's guilt beyond a reasonable doubt.[7] In such a case, where no claim is made by the prosecution that the machine was obtained by false pretenses, an instruction distinguishing between the two crimes, though unnecessary, is not prejudicially erroneous.[8]

§ 254. **New Trial.**—Where, in a prosecution for violating the provisions of section 21 of the Vehicle Act, re-

6. People v. Fodera, 33 Cal. App. 8, 164 Pac. 22. The reference is to Pen. Code, § 367c (before its incorporation into the Motor Vehicle Act).

7. People v. Carnes, 33 Cal. App. Dec. 121, 192 Pac. 1088. See CRIMINAL LAW.

8. People v. Carnes, 33 Cal. App. Dec. 121, 192 Pac. 1088. See LARCENY.

quiring an automobile driver to carry a person injured in a collision with his car to a physician, if he so requests, full cross-examination of the complaining witness as to a physical encounter had by him shortly before the collision, and in which his injuries might have been received, was prevented by the court, affidavits of his antagonist in that encounter, and of witnesses to it, showing that his injuries were in fact received at that time, require the granting of the new trial, the general rule that a new trial will not be granted merely on testimony tending to impeach a witness being subject to modification in the sound discretion of the court.[9]

9. People v. Kaufman, 33 Cal. App. Dec. 338, 193 Pac. 953. See CRIMINAL LAW.

(C. M.)

AVULSION.

See WATERS.

AWARD.

See ARBITRATION AND AWARD, *ante*, p. 27.

BAGGAGE.

See CARRIERS.

BAIL AND RECOGNIZANCE.

I. Introductory.

1. Scope of Article—Object of Bail Generally.
2. Definitions and Distinctions.

II. In Criminal Cases.

IN GENERAL.

3. Constitutional and Statutory Provisions.
4. Bail Before Conviction in Criminal Cases Generally.
5. Right in Capital Cases Before Conviction.
6. Construction of Phrases: "Proof is Evident," or "Presumption Great."
7. Effect of Indictment in Capital Cases.
8. Bail After Conviction and Pending Appeal—Code Provisions.
9. Discretion in Granting Bail After Conviction.
10. Extraordinary Circumstances Authorizing Bail After Conviction.
11. Right of Court to Order Accused into Custody.

AUTHORITY TO ADMIT TO BAIL—PROCEEDINGS.

12. Before Indictment and Before Conviction.
13. Pending Appeal—Rearrest and Remand Generally.
14. Application for Bail—Duty of Court or Judge.
15. Denial or Allowance of Bail—Second Application and Review.
16. Habeas Corpus for Purpose of Giving Bail.

AMOUNT.

17. In General.
18. Excessive Bail.
19. Increase or Reduction of Bail.

Cases are cited in this article to and including 181 Cal., 41 Cal. App., and 196 Pac.

DEPOSIT IN LIEU OF BAIL.

20. In General.
21. Application of Deposit to Judgment or Fine.
22. Return of Deposit.
23. Deposit Made by Third Person or by Surety.

THE UNDERTAKING OF BAIL.

24. The Undertaking—Distinguished from Recognizance.
25. Justification of Bail—Discharge of Prisoner.
26. Recitals in and Terms of Bond—Onerous Provisions.
27. Formal Requisites Generally—Reforming Bail Bond.

LIABILITY OF BAIL.

28. In General—When Liability Attaches.

DISCHARGE OR EXONERATION OF BAIL.

29. In General—Surrender of Defendant Generally.
30. Other Modes of Exonerating Bail.

FORFEITURE OF BAIL OR MONEY DEPOSITED.

31. General Rule.
32. Limitation of Rule as to Forfeitures.

ACTIONS ON BAIL BONDS.

33. Complaint.
34. Parties.
35. Defenses.
36. Judgment.

III. Bail in Civil Cases.

37. Right to Bail Generally.
38. Proceedings for Admission to Bail—The Undertaking.
39. Deposit of Money or Property in Lieu of Bail.
40. Qualification and Justification of Bail.
41. Exoneration of Bail Generally.
42. Liability and Exoneration of Sheriff as Bail.
43. Reimbursement of Bail.

I. Introductory.

§ 1. Scope of Article—Object of Bail Generally.—This article treats of bail and recognizance both in criminal and civil cases; and, although both classes of cases have many features in common, it is deemed best to treat each class separately. False personation of bail involves principles not within the scope of this article, and hence is treated under another topical heading.[1]

The object of bail in criminal cases is to secure the attendance of the defendant upon the court at all times when his attendance may be lawfully required, and his rendering himself in execution of any judgment that may be pronounced against him in the proceeding wherein he has given bail.[2] The object of bail in civil cases, on the other hand, is either directly or indirectly to secure the payment of a debt or the observance of a civil obligation.[3] In either case the principal is considered as being released from the custody of the law and placed in the custody of keepers of his own selection, who are liable for his appearance and attendance upon the court in accordance with the undertaking.[4] The difference between the liability of sureties on a bail bond and the liability of sureties on ordinary bonds is drawn in another section of this article.[5]

§ 2. Definitions and Distinctions.—Strictly speaking, "bail" has reference to the undertaking of the sureties on the bail bond into whose custody the body of the defendant is given in bailment on his release from legal custody upon execution and acceptance of the bail bond;

1. See FALSE PERSONATION.
For security to keep the peace, see BREACH OF THE PEACE; and for the general law of principal and surety, see SURETYSHIP.

2. Ex parte Ruef, 8 Cal. App. 468, 97 Pac. 89; Ex parte Ruef, 7 Cal. App. 750, 96 Pac. 24.

3. See 3 Ruling Case Law, p. 5. See infra, §§ 3–36, for bail in criminal cases; and infra, §§ 37–43, for bail in civil cases.

4. See infra, § 2.

5. See infra, § 28.

while "recognizance" relates to the undertaking of the defendant in the bail bond, when he joins in its execution, or to his individual undertaking, without sureties, for his appearance in court in a particular case, as required by the court; and "bail and recognizance" has reference to the undertakings both of the sureties and of the defendant when they all join the undertaking. In one sense the word "bail" means the release of a person from custody upon the undertaking of two or more persons for him, and also upon his own recognizance, that he shall appear to answer the charge against him at the time appointed. It is the delivery or bailment of a person to his sureties, so that he is placed in their friendly custody instead of remaining in prison. The word is also used to designate those persons who become securities for the appearance of the defendant, and also, in some cases, to designate the undertaking itself, though this is more frequently referred to as the bail bond or recognizance.[6] A recognizance is defined as an obligation of record.[7] While a distinction between a "bail bond" and a "recognizance" which affects the character of the undertaking may characterize the rules in certain jurisdictions,[8] the terms seem, however, to be used without distinction in most of the cases, and the rules laid down ordinarily are applicable to both—the "undertaking" being spoken of sometimes in the statutes and the decisions as "bail" and at other times as "recognizance." For this reason, and since the statute has swept away the original and technical distinction between the terms so far as the law of this state is concerned,[9] the words "bail" and "recognizance" will be used interchangeably in this article.

6. 3 Ruling Case Law, p. 4.

7. Mendocino Co. v. Lamar, 30 Cal. 627. See Reese v. United States, 9 Wall. (U. S.) 13, 19 L. Ed. 541 (case arising in California and defining purpose of bail or recognizance).

8. 3 Ruling Case Law, p. 32, § 38.

9. See infra, §§ 24, 25.

Terms used in the code.—The Penal Code provides that

"The taking of bail consists in the acceptance, by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the people of this state a specified sum";[10] while "Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail."[11]

And the Civil Code provides that

"Upon those contracts of indemnity which are taken in legal proceedings as security for the performance of an obligation imposed or declared by the tribunals, and known as undertakings or recognizances, the sureties are called bail."[12]

II. In Criminal Cases.

In General.

§ 3. Constitutional and Statutory Provisions.—The California constitution of 1879 provides that

"All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident, or the presumption great."[13]

And the same provision was contained in the constitution of 1849.[14] This constitutional provision, together with statutes in harmony therewith, govern the right of persons to bail.[15]

At common law, applications for bail in criminal cases were addressed to the sound discretion of the judges, to be exercised upon the circumstances appearing in each particular case. It was to alter this broad discretion and to secure greater liberty to accused persons, pending judi-

10. Pen. Code, § 1269.
11. Pen. Code, § 1268.
12. Civ. Code, § 2780.
13. Const. 1879, art. I, § 6 (quoted in part).
14. Const. 1849, art. I, § 7; Ex parte Brown, 68 Cal. 176, 8 Pac. 829.
15. See infra, §§ 4–9.

cial inquiry as to their guilt or innocence, that the constitutional provision was adopted. While the constitution, in declaring bail to be a matter of right, alters the common-law rule as to criminal cases before conviction, it leaves the matter of bail after conviction and pending appeal still discretionary with the court or judge as it was at common law,[16] with, however, certain statutory modifications to be hereafter noted.[17]

The constitutional provision has been interpreted to mean under the California law that bail should be refused in a capital case where the evidence is such that a verdict of guilty based upon it would be sustained by a court.[18] It has been said that "the admission to bail in capital cases, where the proof is evident or the presumption is great, may be made a matter of discretion, and may be forbidden by legislation, but in no other cases."[19] In accordance with this last-quoted expression of the court, the legislature has supplemented the constitutional provision by enacting that "a defendant charged with an offense punishable with death cannot be admitted to bail when the proof of his guilt is evident or the presumption thereof great,"[20] thus leaving the right to bail in such capital cases dependent on the determination of the judge or court as to whether the proof of guilt is evident or the presumption thereof great.[1]

§ 4. Bail Before Conviction in Criminal Cases Generally.—Before conviction, the defendant in a criminal case

16. Ex parte Voll, 41 Cal. 29; People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77.

17. See §§ 8, 9, post, as to bail after conviction and pending appeal; and infra, § 11, as to right of court to order defendant into custody on the trial.

18. In re Weinberg, 177 Cal. 781, 171 Pac. 937; Ex parte Curtis, 92 Cal. 188, 28 Pac. 223; Ex parte Troia, 64 Cal. 152, 28 Pac. 231; In re Weinberger, 35 Cal. App. 806, 171 Pac. 110; In re Mooney, 35 Cal. App. 797, 171 Pac. 109. See infra, § 6, as to conflict in other jurisdictions as to the meaning of such a provision.

19. People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77.

20. Pen. Code, § 1270.

1. See infra, § 6.

is entitled to be released on sufficient bail, except in the one instance heretofore noted;[2] and admission to bail in such cases is a right which the accused can claim, and which no judge or court can properly refuse.[3] The code provides that

"If the offense is bailable, the defendant may be admitted to bail before conviction, First:—For his appearance before the magistrate, on examination of the charge, before being held to answer; Second:—To appear at the court to which the magistrate is required to return the depositions and statement, upon the defendant being held to answer after examination; Third:—After indictment, either before the bench-warrant is issued for his arrest, or upon any order of the court committing him, or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment in the court in which it is found, or to which it may be transferred for trial."[4]

It is also provided by the code:

"The defendant [in a justice court or police court], at any time after his arrest, and before conviction, may be admitted to bail."[5]

And further:

"If a postponement [of the examination] is had, the magistrate must commit the defendant for examination, admit him to bail, or discharge him from custody upon the deposit of money as provided in this code, as security for his appearance at the time to which the examination is postponed."[6]

The right to bail, or to be discharged on deposit of money instead of bail, depends, of course, on whether the offense charged is a bailable one.[7]

2. Ex parte Curtis, 92 Cal. 188, 28 Pac. 223. See supra, § 3.

3. Pen. Code, § 1271. But see infra, § 12, as to bearing of § 1129, Pen. Code, on section 1271, and as to the right of the court to order the defendant in felony cases, not under the constitutional exception, into custody after appearance for trial and before conviction; People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77 (per Field, C. J.); Ex parte Ruef, 8 Cal. App. 468, 97 Pac. 89. See infra, § 8 et seq., as to bail after conviction.

4. Pen. Code, § 1273.

5. Pen. Code, § 1458.

6. Pen. Code, § 862.

7. See supra, § 3, as to bailable offenses.

§ 5. Right in Capital Cases Before Conviction.—The legislature has enacted that in capital cases the accused cannot be admitted to bail "when the proof of his guilt is evident or the presumption thereof great."[8] Conversely, a person arrested and charged with a crime punishable by death is entitled to release on bail and recognizance where the proof is not evident nor the presumption of guilt great.[9] A statute which rendered admission to bail "a matter of discretion in all cases where the punishment is death,"[10] was held unconstitutional for the reason that admission to bail before conviction in a capital case where the proof is not evident nor the presumption great is a matter of right.[11] It is only in capital cases where the proof of guilt is evident or the presumption thereof great that the legislature can make admission to bail a matter of discretion.[12]

Application of rule.—One arrested and charged with the crime of murder alleged to have been committed by him by performing an act of abortion resulting in the death of the female is entitled to bail, where there is nothing to show actual intent to kill, as the act of the accused could at most be only murder in the second degree, since to constitute murder in the first degree, the unlawful killing must be accompanied with a clear and deliberate intent to take life. The accused is entitled to bail in such case because it does not appear from the charge that the offense is a capital one.[13] In a case where several indict-

8. Pen. Code, § 1270, following the language of the constitution. See supra, § 3.

9. Const., art. I, § 6 (see supra, § 3); Ex parte Brown, 68 Cal. 176, 8 Pac. 829; Ex parte Strange, 59 Cal. 416. And see cases cited infra.

If a person arrested is charged with a capital offense, the officer making the arrest must deliver the accused into custody according to the command of the bench-warrant, and when so delivered he must be held by the sheriff unless admitted to bail on examination upon a writ of habeas corpus. Pen. Code, §§ 1285, 1286.

10. Crim. Prac. Act, § 509 (Stats. 1851–52, p. 268).

11. People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77.

12. See supra, § 3.

13. Ex parte Wolff, 57 Cal. 94.

ments have been returned against the accused for murder in the first degree, all based upon a single transaction, and he has been tried upon one of the indictments and acquitted, and other of the indictments have been dismissed, and the district attorney declares that he is not ready to proceed to trial upon the pending indictments, and makes no claim that he relies upon any other testimony than that adduced upon the trial of the indictment on which accused was acquitted, accused is entitled on habeas corpus to be admitted to bail under the provisions of section 6 of article I of the constitution. In a case of this character it cannot be said that the proof of guilt is evident or that the presumption of guilt is great.[14]

It has been held that extraordinary circumstances authorizing one accused of burning Indian lodges, killing several Indians, and perpetrating other outrages, to admission to bail, prior to conviction, were shown, where there were no definite and well-understood laws relating to proceedings in the existing courts of first instance, and because of the uncertainty as to the time when the district courts would be ready to proceed with business, superadded to the fact that there was no jail in which prisoners could be kept with security.[15] The exercise of discretion in such case was prior to the enactment of the code, and was for reasons other than the want of evident proof or great presumption of guilt, namely, what might be denominated extraordinary circumstances.[16]

§ 6. Construction of Phrases: "Proof is Evident," or "Presumption Great."—The expressions, "proof is evident," or "presumption great," have received different interpretations by the courts of the various states, some courts holding that the prisoner is entitled to bail unless the evidence against him is such as ought to satisfy a

14. In re Weinberg, 177 Cal. 781, 171 Pac. 937. See infra, § 6, as to the meaning of the phrases: "proof is evident," or "presumption great."

15. People v. Smith, 1 Cal. 9.

16. See Pen. Code, § 1270. See infra, §§ 8, 9, as to bail after conviction.

trial jury of his guilt beyond a reasonable doubt; while others hold that bail should be denied where the evidence is sufficient in law to sustain a capital conviction. The latter rule has been adopted in this state.[17] So, in a habeas corpus proceeding, the court ought not to anticipate the action of the jury by discharging the prisoner, charged with a capital offense, with or without bail, upon evidence which it cannot say is so insufficient that a verdict requiring a capital sentence should not be permitted to stand.[18] It has been held that to sustain an order refusing to admit a prisoner charged with a capital offense to bail, it is not necessary that the evidence should be so convincing as to justify a verdict against the accused, but it is sufficient if it points to him and induces the belief that he may have committed the offense charged.[19]

Matters to be considered in application of rule.—The fact that the prisoner charged with a capital offense, has been tried and the jury could not agree on a verdict, while not conclusive of his right to bail, is entitled to weight in determining whether he should be admitted to bail.[20] And it may be, in view of the evidence in a capital case presented upon a former trial, the improbability of the jury agreeing upon a verdict, and their discharge without defendant's consent, thereby protracting his confinement, in addition to his long imprisonment before being placed on trial, that the accused is entitled to release on bail.[1] Still more persuasive, though not controlling of the prisoner's right to bail, is his acquittal on a trial of one of several indictments, all of which are

17. See supra, § 3, for authorities establishing the rule in California; and see 3 Ruling Case Law, p. 10, for authorities generally showing a variance of opinion on this point.

18. Ex parte Curtis, 92 Cal. 188, 28 Pac. 223; Ex parte Traid, 64 Cal. 154, 28 Pac. 231.

19. Ex parte Winthrop, 5 Cal. Unrep. 56, 40 Pac. 751.

20. In re Weinberger, 177 Cal. 781, 171 Pac. 937; Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 272.

1. Ex parte Laughlin, 41 Cal. 211, 10 Am. Rep. 272.

founded upon a single transaction.[2] As pointed out in a subsequent section, the mere finding of an indictment does not add to the strength of the proof or the presumption.[3]

Bail should be refused in a capital case if the proof of guilt is evident, as shown by the evidence produced before the committing magistrate, or the presumption thereof great.[4] And bail should be refused in such a case, upon application to the supreme court for writ of habeas corpus, where the evidence taken upon the preliminary examination shows facts sufficient to support a verdict of murder in the first degree.[5]

§ 7. Effect of Indictment in Capital Cases.—The code provides that

"The finding of an indictment does not add to the strength of the proof or the presumption to be drawn therefrom."[6]

This code provision—a part of a section providing where defendants in capital cases are not entitled to bail—has apparently not received judicial construction. However, it evidently has reference to the proof produced on a preliminary examination in which the accused is bound over to await the action of the grand jury, and not to the proof produced on the trial of accused on the merits of the case, as the section is found in the chapter relating to bail, and it was no doubt intended that, in proceedings for admission to bail, the court or judge should pass on such application, by consideration of the evidence which has been adduced, without reference to the finding of the indictment. As indicating this construction, it may be noted that in considering the question as to right to bail, the courts refer to, and, in practice, base their rul-

2. In re Mooney, 35 Cal. App. 797, 171 Pac. 109; In re Weinberger, 35 Cal. App. 806, 171 Pac. 110.

3. See infra, § 7, as to effect of indictment in capital cases.

4. Ex parte Walpole, 85 Cal. 362, 24 Pac. 657.

5. Ex parte Curtis, 92 Cal. 188, 28 Pac. 223.

6. Pen. Code, § 1270.

ings on the transcript of the testimony given at the preliminary hearing.[7]

Rule prior to enactment of code provision.—Prior to the enactment of the code provision above quoted, the supreme court held that an indictment for a capital offense of itself raised a presumption of guilt of the accused, too great to entitle him to bail as a matter of right under the constitution; that it created a presumption of guilt for all purposes except the trial before a petit jury; that if it furnished no such presumption, it would not justify the execution of bail or the detention of the accused. The court also held that, after return of an indictment in a capital case, circumstances may arise which would justify the allowance of bail; as the happening of an event which indefinitely postpones the further prosecution of the action,—for instance, the repeal of the statute giving jurisdiction to the court to try the indictment, where jurisdiction depends on statute; or where the statute creating the offense charged has been repealed without reservation of the penalty as to past offenses; or where the trial of the accused had been unduly delayed; or in cases where the court may discharge the prisoner on his own recognizance, "to answer the charge at the time to which the action is continued";[8] or upon the admission of the public prosecutor that the evidence which he can produce will not warrant a conviction of a capital offense, or upon his admission of facts from which it is evident no conviction of a capital offense can be had; or where, upon the trial, the evidence for the prosecution and the defense has been produced and the jury cannot agree on a verdict; or where after verdict a new trial has been granted for insufficiency of the evidence to warrant a conviction. Under such circumstances, it was declared,

7. See Ex parte Curtis, 92 Cal. 188, 28 Pac. 223; and Ex parte Walpole, 85 Cal. 362, 24 Pac. 657.

8. People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77. See Crim. Prac. Act (Stats. 1851-52, c. 29, § 595, p. 278). And see Pen. Code, § 1383.

the court in its discretion could allow bail without the hearing of evidence as to the guilt or innocence of the accused. Circumstances of unusual character may arise, it has been said, which would justify the reception of evidence to rebut the presumption of guilt created by the indictment under this early ruling, as, for example, the existence, at the time the indictment was found, of great popular excitement with reference to the prisoner or the charge against him, likely to bias and warp the judgment of the grand jurors; or the existence of the person charged to have been murdered; or the clear confession by another of the commission of the offense for which the prisoner is indicted. But mistake or malice in instituting the prosecution, it was said, would not justify the reception of evidence to rebut the presumption thus originally created by the indictment.[9]

§ 8. Bail After Conviction and Pending Appeal—Code Provisions.—The rule as to bail after conviction and upon appeal is thus stated by the code:

"After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail: (1) As a matter of right when the appeal is from a judgment imposing a fine only; (2) As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor; (3) As a matter of discretion in all other cases."[10]

The code further provides that "after conviction and upon an appeal," the defendant may be admitted to bail:

"First: If the appeal is from a judgment imposing a fine only, on the undertaking of bail that he will pay the same, or such part of it as the appellate court may direct, if the judgment is affirmed or modified, or the appeal dismissed; Second: If judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon

9. People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77.

10. Pen. Code, § 1272. See infra, § 9, for rules as to discretion in granting bail after conviction.

its being affirmed or modified, or upon the appeal being dismissed; or that in case the judgment be reversed, and that the cause be remanded for a new trial, that he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof."[11]

Effect of an appeal.—It is provided by the code as follows:

"An appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the supreme court, that, in his opinion, there is probable cause for the appeal, but not otherwise."[12]

Under the statutes in force prior to the enactment of this code provision, the courts had no authority to directly stay the proceedings upon appeal taken from judgments in felonies less than capital in degree. The only method by which such a stay could be effected, was by admitting the prisoner to bail; and as cases not infrequently arose in which it could be seen upon inspection of the record, that substantial justice required that the proceedings should be stayed pending the appeal, admission to bail followed almost as of course, when the prisoner was pecuniarily able to furnish bail. But whether the stay operated to avert the punishment depended solely upon the ability or inability of the defendant to give bail.[13]

§ 9. Discretion in Granting Bail After Conviction.—As stated in a prior section, the allowance of bail after conviction and pending appeal is still discretionary in certain cases, as the rule was at common law.[14] As affecting

11. Pen. Code, § 1273 (in part).

12. Pen. Code, § 1243. See CRIMINAL LAW.

13. Ex parte Marks, 49 Cal. 680. See Ex parte Hoge, 48 Cal. 1, a case which, the code commissioners said, in recommending the enactment of section 1243 of the Penal Code, "illustrates the evil of the rule existing prior to the code."

14. See supra, §§ 3, 8.

the granting of bail after conviction of a felony, the question sometimes arises whether the prisoner has or has not been "convicted" of the offense charged against him. The words "convict" or "convicted" have reference to the verdict of the jury, and not to the sentence pronounced on the defendant. They may also have reference to the confession of the accused in open court, or to a plea of guilty prior to delivery of judgment.[15] It is a general rule that an application for admission to bail after conviction of a felony not involving the death penalty is addressed to the sound discretion of the trial court in which the conviction was had.[16] However, such discretion should not be arbitrarily exercised;[17] but should be governed by legal rules with the view of doing justice according to law, or to the analogies of the law as near as may be.[18] Such discretion being vested primarily in the court which tried the case, or in the judge thereof, its exercise will not be disturbed or ignored, except in an instance of manifest abuse,[19] or where extraordinary circumstances have supervened since the conviction.[20] The issuance of a certificate of probable cause is not alone sufficient ground for admission to bail pending the appeal, as such certificate

15. Ex parte Brown, 68 Cal. 176, 8 Pac. 829. See Pen. Code, § 689, as to conviction.

16. Ex parte Turner, 112 Cal. 627, 45 Pac. 571; Ex parte Smith, 89 Cal. 79, 26 Pac. 638; Ex parte Brown, 68 Cal. 176, 8 Pac. 829; People v. Marshall, 59 Cal. 386; Ex parte Smallman, 54 Cal. 35; Ex parte Hoge, 48 Cal. 3; Matter of Application of Preciado, 30 Cal. App. 323, 158 Pac. 1063; Ex parte Hatch, 15 Cal. App. 186, 114 Pac. 410.

17. Ex parte Smallman, 54 Cal. 35; Ex parte Hoge, 48 Cal. 3.

18. Ex parte Hoge, 48 Cal. 3.

19. Ex parte Turner, 112 Cal. 627, 45 Pac. 571; People v. January, 70 Cal. 34, 11 Pac. 326; People v. Perdue, 48 Cal. 552; Matter of Application of Preciado, 30 Cal. App. 323, 158 Pac. 1063 (stating the rule, but holding that it was an abuse of discretion to refuse the application for admission to bail pending an appeal from a conviction for embezzlement, where it was shown that the defendant was suffering from epilepsy in its most serious form); People v. Cornell, 28 Cal. App. 654, 153 Pac. 726; Ex parte Hatch, 15 Cal. App. 186, 114 Pac. 410. As to review of court's discretion generally, see APPEAL AND ERROR, vol. 2, p. 896 et seq.

20. See infra, § 10.

has become a matter of such common occurrence that the appellate court would not be warranted in considering it either as evidence of illegal conviction or of the existence of reversible errors.[1] It has been held that an application for bail in a felony case after conviction should not be denied on the objection that no appeal has been taken in the case, where an attorney of the court, though not the attorney who appeared for defendant on the trial, signed the notice of appeal, and was authorized by defendant to take the appeal.[2]

§ 10. Extraordinary Circumstances Authorizing Bail After Conviction.—It is a settled rule in this state that the appellate court ought not to admit to bail after a conviction of a felony and pending appeal, except where circumstances of an extraordinary character have intervened since the conviction.[3] As to what is meant by "circumstances of an extraordinary character" occurring after conviction, the court in one case said:

"Obviously, this question cannot be fully or satisfactorily answered by mere anticipation of possibilities. It might be that after conviction of a felonious homicide the supposed deceased was produced and seen to be alive; or it might be discovered that property, the subject of a supposed larceny, had all the time been in the possession of its owner, and overlooked by mistake. A variety of illustrations might be suggested of circumstances distinguishing a particular case from the general mass of other criminal cases, and appealing more or less strongly to the discretion of the court to admit the prisoner to bail, even after conviction."[4]

1. People v. Cornell, 28 Cal. App. 654, 153 Pac. 726, per Plummer, J.

2. Ex parte Clarke, 62 Cal. 490 (holding that Code Civ. Proc., §§ 284, 285, have no application to criminal cases).

3. Ex parte Turner, 112 Cal. 627, 45 Pac. 571; Ex parte Smith, 89 Cal. 79, 26 Pac. 638; Ex parte Brown, 68 Cal. 176, 8 Pac. 829 (declaring this to be the settled law of the state); People v. Marshall, 59 Cal. 386; Ex parte Smallman, 54 Cal. 35; Ex parte Marks, 49 Cal. 680; Ex parte Voll, 41 Cal. 29; Ex parte Hatch, 15 Cal. App. 186, 114 Pac. 410.

4. Ex parte Smallman, 54 Cal. 35 (per Wallace, C. J.).

Even where circumstances of an extraordinary character supervene, the application for admission to bail on such grounds should always be made in the first instance, if practicable, to the judge before whom the defendant was tried. However, the appellate court may entertain the application as in proceedings generally where the discretion of the trial court is in review, and where it is claimed that such discretion has been abused. And that court will admit the prisoner to bail, upon a sufficient showing that his imprisonment pending the appeal, would result in serious injury to his health or endanger his life.[5] But where the reasonable inference from the showing made is that there is only a fear that further confinement of the prisoner pending appeal will endanger his health or life, and not that there is imminent danger from further confinement, bail should be denied.[6] In this connection it has been held that an application to the appellate court for writ of habeas corpus for admission to bail pending appeal, on the ground that confinement of the defendant pending the appeal would result in great danger to his health and his physical and mental condition, should be denied, where the affidavits used in opposition to the application on the hearing in the trial court are not made a part of the petition, nor found in the transcript of the proceedings in the lower court upon application for bail. In such case an appellate court cannot say that the lower court abused its discretion in denying the application.[7] The fact that some of the jurors have, since the trial, stated that they had become convinced that they committed a mistake in rendering a verdict against the accused cannot be considered on an application for bail.[8]

5. In re Ward, 127 Cal. 489, 47 L. R. A. 466, 59 Pac. 894 (illness of prisoner); Ex parte Azhderian, 123 Cal. 512, 56 Pac. 1130 (illness of prisoner); Ex parte Turner, 112 Cal. 627, 45 Pac. 571 (illness of prisoner); Matter of Application of Preciado, 30 Cal. App. 323, 158 Pac. 1063 (epileptic).

6. People v. Cornell, 28 Cal. App. 654, 153 Pac. 726.

7. Ex parte Hatch, 15 Cal. App. 186, 114 Pac. 410. See APPEAL AND ERROR, vol. 2, p. 896 et seq.

8. Ex parte Smallman, 54 Cal. 35.

§ 11. Right of Court to Order Accused into Custody.—On conviction by a verdict of a felony, not capital, it is in the discretion of the court to order the defendant, when on bail, into the custody of the proper officer; but when the court does so, it orders him there to be kept by the officer until judgment is pronounced. If there can be any admission to bail following conviction, it must be discretionary with the court, and not a matter of right of the defendant.[9]

Ordering into custody on appearance for trial.—The code provides as follows:

"When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly."[10]

It would seem that this provision of the code effects a modification of the rule as declared in section 1271 of the Penal Code,[11] inasmuch as it limits bail "as a matter of right" in unexcepted felony cases, to the time of the "appearance of the accused for trial" rather than to the time of "conviction" as fixed by section 1271. In other words, the matter of admission to bail in such cases, pending a trial, is, under section 1129, "a matter of discretion;" whereas, under section 1271, it is made "a matter of right." Section 1129 has been upheld by the supreme court.[12] But the reason given for its validity seems not to be the true one, since it is based upon a ruling that in a case where the defendant is charged with a felony, and has been admitted to bail, and the circumstances are such that there is danger of his absconding (there having been an actual absconding in the case pending trial), it is proper to order the defendant into actual

9. Ex parte Brown, 68 Cal. 176, 8 Pac. 829.

10. Pen. Code, § 1129.

11. See supra, § 4.

12. People v. Williams, 59 Cal. 674.

custody to insure his personal presence on the trial as required by section 1148 of the Penal Code.[13]

The code further provides that

"The court to which the committing magistrate returns the depositions, or in which an indictment, information, or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged, in the following cases: 1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof. 2. When it satisfactorily appears to the court that his bail, or either of them, are dead or insufficient, or have removed from the state. 3. Upon an indictment being found or information filed in the cases provided in section nine hundred and eighty-five."[14]

And further:

"The order for the recommitment of the defendant must recite generally the facts upon which it is founded, and direct that the defendant be arrested by any sheriff, constable, marshal, or policeman in this state, and committed to the officer in whose custody he was at the time he was admitted to bail, to be detained until legally discharged."[15]

"The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county, in the same manner as upon a warrant of arrest, except that when arrested in another county the order need not be indorsed by a magistrate of that county."[16]

"If the order recites, as the ground upon which it is made, the failure of the defendant to appear for judg-

13. People v. Beauchamp, 49 Cal. 41.

From a consideration of the cases it would seem that the divergence between these two sections of the code does not involve a contradiction, but that they may be harmonized upon the principle that section 1129 is in effect a limitation of section 1271, and a reduction of the right of the accused as declared by the latter section. See STATUTES as to the rules of construction generally.

14. Pen. Code, § 1310.

15. Pen. Code, § 1311.

16. Pen. Code, § 1312.

ment upon conviction, the defendant must be committed according to the requirements of the order."[17]

It has been held that the substantial rights of an accused are not prejudiced by an order of the court, in the presence of the jury, after argument of counsel and before the retirement of the jury to consider as to their verdict, that the sheriff take accused into custody, as indicating the guilt of accused in the opinion of the court, even if the order could be held erroneous.[18]

Authority to Admit to Bail—Proceedings.

§ 12. Before Indictment and Before Conviction.—Before indictment,

"When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus."[19]

If one is charged with a felony, the prisoner, in order to procure bail, should be taken before the magistrate by whom the warrant was issued, or before some magistrate of the county.[20] The code further provides that,

"When the offense charged is not punishable with death, the officer serving the bench-warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail."[1]

Under the provisions of this section of the code, one charged with a crime cannot be admitted to bail by a magistrate of a county other than the one in which the warrant was issued, or in which the arrest was made.[2]

17. Pen. Code, § 1313.

18. People v. Williams, 59 Cal. 674.

19. Pen. Code, § 1277.

20. Ex parte Hung Sin, 54 Cal. 102; Ex parte Ah Fong Chi, 2 Cal. Unrep. 70.

1. Pen. Code, § 1284.

2. Mansir v. Superior Court of San Diego County, 65 Cal. 582, 4 Pac. 627.

In misdemeanor cases.—In the procedure generally applicable in criminal cases, one accused of an offense is not entitled to release, without bail, upon his mere promise to appear for arraignment and trial, nor will such a release ordinarily be permitted by an arresting officer, until so ordered by the court or magistrate. This rule has been modified as to certain offenses under the Motor Vehicle Act.[3]

§ 13. Pending Appeal—Rearrest and Remand Generally.—The code provides that

"In the cases in which defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made by any magistrate having the power to issue a writ of habeas corpus, or by the magistrate before whom the trial was had."[4]

So, it has been held that the power to admit a prisoner to bail pending appeal from a judgment of conviction of a felony ought not to be exercised by the supreme court in the first instance, nor until after determination upon its merits of an application for bail before the judge who tried the cause.[5]

"If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, and take bail from him accordingly."[6]

And, "If the defendant is brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings must be had thereon."[7]

3. Act May 10, 1917, § 22, subd. (c); Stats. 1917, c. 218, p. 404; In re Turck, 37 Cal. App. 601, 174 Pac. 100. See AUTOMOBILES, ante, p. 766.

4. Pen. Code, § 1291; Matter of Application of Preciado, 30 Cal. App. 323, 158 Pac. 1063. See infra, § 16, as to remand upon habeas corpus.

5. Ex parte Turner, 112 Cal. 627, 45 Pac. 571; People v. January, 70 Cal. 34, 11 Pac. 326; People v. Perdue, 48 Cal. 552.

6. Pen. Code, § 822. And see Pen. Code, § 829.

7. Pen. Code, § 984.

Upon rearrest of the accused, the code provides that "When the defendant is admitted to bail, the bail may be taken by any magistrate in the county, having authority in a similar case to admit to bail, upon the holding of the defendant to answer before an indictment, or by any other magistrate designated by the court."[8]

§ 14. The Application for Bail—Duty of Court or Judge.—The application for admission to bail, after conviction and pending appeal, should, if practicable, be made in the first instance to the judge before whom the applicant was tried.[9] The fact that the case has been brought to the supreme court on appeal by the defendant affords no reason why such an application should not be entertained by the judge of the court which tried the cause, as the facts and circumstances going to make up the legal discretion, in the sound exercise of which the prisoner may be admitted to bail, are within his knowledge.[10] The manner of making application for bail in the lower courts and before magistrates is not pointed out by the code, and in practice is an informal one, being merely in the form of a request to the judge or magistrate, who, if the offense is a bailable one, fixes the amount of the bond and approves or rejects the offered sureties or security. But where the application is made to a district court of appeal or to the supreme court, it is more formal, and may be either by petition for writ of habeas corpus or by motion.[11]

8. Pen. Code, § 1315.

9. Ex parte Turner, 112 Cal. 627, 45 Pac. 571; People v. January, 70 Cal. 34, 11 Pac. 326; People v. Perdue, 48 Cal. 552; Matter of Application of Preciado, 30 Cal. App. 323, 158 Pac. 1063; People v. Cornell, 28 Cal. App. 654, 153 Pac. 726; Ex parte Hatch, 15 Cal. App. 186, 114 Pac. 410.

10. People v. Perdue, 48 Cal. 552.

11. Ex parte Turner, 112 Cal. 629, 45 Pac. 571; People v. January, 70 Cal. 34, 11 Pac. 326; People v. Cornell, 28 Cal. App. 654, 153 Pac. 726 (pointing out that in certain other states having somewhat similar code provisions as this state, a proceeding to admit to bail may be either by motion or by petition for writ of habeas corpus).

Notice of application.—The code provides that

"When admission to bail is a matter of discretion, the court or officer to whom the application is made must require reasonable notice thereof to be given to the district attorney of the county."[12]

Duty of court or judge.—On application for bail, it is the duty of the court to follow the law in all cases, under all circumstances, without fear and without regard to public clamor, with no friendships, no prejudice, and totally without regard to personal consequences to himself. Moreover, the judge should look to the law and the rule prescribed by the legislature for his guidance, regardless of his own personal opinions.[13]

§ 15. Denial or Allowance of Bail—Second Application and Review.—Whether an order admitting a prisoner to bail is res judicata and final as to the state and accused, except as to the amount, does not appear to have been definitely passed upon in this state. In other jurisdictions it has been held that after the right to bail has once been passed upon in favor of the accused, such question cannot be reopened to permit the prosecution to introduce evidence in rebuttal of that offered by the applicant.[14] But in a case where one charged with murder waived a preliminary examination before a justice of the peace, and the justice without examining witnesses admitted the accused to bail, it was held not to preclude a second examination by the trial judge, when such examination was instituted and conducted according to statutory requirements, and the holding of the accused to bail in another amount. It was said that another question would be raised had the justice regularly pursued the statute and examined witnesses and proceeded in other respects in accordance with the law, and thereupon held the accused to bail in a named sum.[15] If the trial court is of

12. Pen. Code, § 1274.

13. Ex parte Ruef, 8 Cal. App. 463, 97 Pac. 89.

14. 3 Ruling Case Law, 31.

15. Ex parte Walsh, 39 Cal. 705.

the opinion that the bail already given is sufficient security, it may allow it to stand unchanged, but if not, it has the power to order the accused to give additional bail, or to be taken into custody in default thereof; or if in its judgment the case is one in which bail ought not to be allowed, the court may order him into custody, notwithstanding any bail which may have been given before the indictment was found.[16]

Second or subsequent application.—The fact that one application for bail has been denied does not preclude a second or subsequent application therefor, if the circumstances warrant its renewal; but the application should be made in the first instance, if practicable, to the judge before whom the defendant was tried, whose determination should not be disturbed or ignored, except in case of manifest abuse of discretion.[17]

Review of proceeding.—The supreme court will pass on the merits of an application for bail, regardless of any action of the trial court, or rule of such court not to admit to bail any defendant who has been convicted of a felony. But, in a proceeding for admission to bail in a felony case after conviction, the supreme court cannot examine into alleged errors of law committed by the lower court, and thereby prejudice the case, before it is brought up on its merits.[18]

§ 16. Habeas Corpus for Purpose of Giving Bail.—The code provides that

"When a person is imprisoned or detained in custody on any criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined."[19]

16. Ex parte Cook, 35 Cal. 107.

17. Ex parte Turner, 112 Cal. 627, 45 Pac. 571.

18. Ex parte Smith, 89 Cal. 79, 26 Pac: 638.

19. Pen. Code, § 1490. See generally, HABEAS CORPUS.

In habeas corpus proceedings for admission to bail in capital cases before conviction, it is the general rule in California that only depositions and other evidence returned by the committing magistrate should be considered. But there may be cases in which new facts have developed or new evidence discovered after the conclusion of the preliminary examination, or in which it would be proper to hear additional testimony on the application. There are decisions of courts of some states, and of federal courts, which hold that the defendant may be allowed to introduce testimony of witnesses not before examined, to impeach witnesses for the state and to prove facts otherwise tending to exculpate him. In California it is the rule that in an application for a writ of habeas corpus, for the purpose of giving bail, before conviction, in which new facts discovered since the preliminary examination are sought to be introduced in evidence, the petition should set out such newly discovered facts or evidence among the grounds of the application, and it should be addressed to the court or judge of the proper county, and not to the supreme court.[20] It has been held that in such proceedings, affidavits and oral testimony as to the guilt or innocence of the accused cannot be received to repel the presumption arising from the indictment in a capital case, in the absence of special or extraordinary circumstances. For, if such evidence were admissible on an application for bail in the supreme court, the question could be raised in such court, on such application, as to the guilt or innocence of the prisoner. This rule prevails in the federal courts and in the courts of nearly all the states. On application for bail after indictment returned, the indictment must be taken as conclusive of the degree of crime.[1] The question as to what is proper evi-

20. Ex parte Curtis, 92 Cal. 188, 28 Pac. 223. See HABEAS CORPUS; CRIMINAL LAW; INDICTMENT AND INFORMATION.

1. People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77. See Ex parte Ruef, 7 Cal. App. 750, 96 Pac. 24, as to presumption of guilt arising from indictment, and see supra, § 7.

dence in a proceeding for admission to bail in a capital case after conviction, is not aided by section 1484 of the Penal Code, relating to procedure on the hearing in a habeas corpus proceeding, as that section is merely the legislative declaration of the generally prevailing rule that the petitioner in habeas corpus may, in a proper case, examine witnesses.[2]

On application to supreme court.—A petition addressed to the supreme court, for bail after conviction of a non-capital felony, and pending an appeal, and while the defendant is imprisoned in the penitentiary, is insufficient which does not state any facts or circumstances whatever upon which it would be possible for the supreme court to exercise an intelligent discretion in determining the application; it not appearing therefrom that any injustice has been done the prisoner in the course of the judicial proceedings in the lower court, nor that any error of law intervened to his prejudice on the trial, nor that it is contemplated that the judgment of conviction will for any reason be disturbed by the supreme court, nor that the appeal was taken in good faith, nor that it will be prosecuted to a final determination.[3] On habeas corpus proceedings in the supreme court it is only when the testimony of material witnesses for the people is clearly shown to be false that such court [if it is ever authorized to determine the credibility of witnesses whose material statements conflict] is justified in discharging the prisoner, with or without bail.[4]

"Any judge before whom a person who has been committed on a criminal charge may be brought on a writ of habeas corpus, if the same is bailable, may take an undertaking of bail from such person as in other cases, and file the same in the proper court."[5]

When, after a hearing on the prisoner's petition for a writ of habeas corpus, he has been remanded, there is

2. Ex parte Curtis, 92 Cal. 188, 28 Pac. 223.

3. Ex parte Voll, 41 Cal. 29.

4. Matter of Troia, 64 Cal. 152, 28 Pac. 231.

5. Pen. Code, § 1491.

ordinarily no proceeding to be stayed pending a review of such order, as the prisoner is not thereafter held by virtue of the order of remand, but by virtue of the warrant or other process upon which he was held at the time the writ of habeas corpus was issued; and the power to admit him to bail belongs exclusively to such officer, if any, who had the power to admit him to bail independently of the habeas corpus proceeding. The prisoner must make his application for bail to that officer, or otherwise, as provided by the laws of the state.[6]

Amount.

§ 17. In General.—It has been said that the Penal Code provides a complete scheme for admitting to bail persons charged with crime, under which the order fixing the amount of bail must be made by a court or magistrate.[7] The sole purpose which should guide the court or judge in fixing the amount of bail in any case, in which bail is allowed, should always be to secure the personal presence of the accused to answer the charge against him. It is not the intention of the law to punish an accused person by imprisoning him in advance of his trial.[8] Matters which may be considered in fixing the amount of bail are, the character of the offense charged, the ability of the accused to furnish bail, and the great number of indictments pending against him, as the greater the number of indictments the greater the probability of conviction, thus increasing the inducement to become a fugitive from justice. But the fact that a large number of indictments have been returned against the accused in any case is not a reason in itself for reducing the amount of bail to be executed in each case.[9] The pecuniary ability of the ac-

6. In re Collins, 151 Cal. 340, 129 Am. St. Rep. 122, 90 Pac. 827, 91 Pac. 397.

7. San Francisco v. Hartnett, 1 Cal. App. 652, 82 Pac. 1064 (citing Pen. Code, §§ 821, 823, 824, 1268, 1269, 1273, 1277).

8. Ex parte Duncan, 54 Cal. 75; Ex parte Ruef, 7 Cal. App. 750, 96 Pac. 24.

9. Ex parte Ruef, 7 Cal. App. 750, 96 Pac. 24.

cused to furnish bail is not in itself controlling as to the amount of bail to be required.[10] The fact that the court in which an information charging the commission of a felony is pending adopted the amount fixed by the judge of the committing court is immaterial, as the important fact is the acceptance of sufficient bail to secure the appearance of the accused according to the terms of the undertaking.[11] The court before whom an indictment is pending has authority to fix the amount of bail, irrespective of any action theretofore taken by the committing magistrate.[12]

Fixing the amount of bail is a judicial act which can be exercised only by officers vested with judicial power, and not by one delegated to perform mere clerical duties. Thus, a warrant and bond clerk authorized by statute to issue bail bonds when the liability therefor does not exceed two thousand dollars, and to order a discharge from custody of prisoners for whom the bonds were issued, and to take cash bail to the amount of one thousand dollars, is not vested with power to fix the amount of the bond; the limitation of the amount beyond which he might not issue bonds being a clear indication that the amount is to be fixed by some other authority. Otherwise he would have power to admit to bail in all cases by fixing the amount of bail at a sum not exceeding two thousand dollars. And particularly is this conclusion strengthened by a provision of the law applicable to the question of his authority which reads: "In the matter of fixing bail and ordering the release of prisoners, the warrant and bond clerk shall be subject to the judges of the police court."[13] The code provides as follows:

" . . . If the offense is bailable, there must be added to the body of the bench-warrant a direction to the following effect: 'Or, if he [defendant] requires it, that you

10. Ex parte Duncan, 54 Cal. 75.
11. People v. Lepori, 35 Cal. App. 60, 169 Pac. 692, 694.
12. Ex parte Ryan, 44 Cal. 555.
13. San Francisco v. Hartnett, 1 Cal. App. 652, 82 Pac. 1064 (construing San Francisco City Charter, c. VIII, art. V, § 5).

take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer to the indictment (or information)'; and the court, upon directing it to issue, must fix the amount of bail, and an indorsement must be made thereon and signed by the clerk, to the following effect: 'The defendant is to be admitted to bail in the sum of —— dollars' "[14]

And it is further provided, that

"If the order for recommitment be made for any other cause [than failure of defendant to appear for judgment] and the offense is bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order, that the defendant be admitted to bail in the sum fixed, which must be specified in the order."[15]

Appeal from order fixing amount.—An appeal will not lie from an order in a habeas corpus proceeding fixing the amount of the bail bond, where there is no provision in the law permitting an appeal from such an order.[16]

§ 18. **Excessive Bail.**—The constitution provides that "Excessive bail shall not be required."[17] The amount of bail to be exacted in each particular case is left to the sound discretion of the court, judge or magistrate having authority to admit the prisoner to bail. No definite rule can be laid down for the determination of what bail is, or what is not, excessive. As has been said, bail should not be exacted for the purpose of punishing a person charged with the commission of a crime.[18] But bail is not to be deemed excessive merely because the person under indictment cannot give the bail required of him.[19]

14. Pen. Code, § 982. See Pen. Code, § 875 (providing for the addition to the order for bail on commitment).

15. Pen. Code, § 1314.

16. People v. Schuster, 40 Cal. 627; Ex parte White, 2 Cal. App. 727, 84 Pac. 242. See CRIMINAL LAW.

17. Const., art. I, § 6, quoted in part; see, also, U. S. Const., amend. 8, to same effect.

18. See supra, § 17.

19. Ex parte Duncan, 54 Cal. 75; Ex parte Ruef, 7 Cal. App. 750, 96 Pac. 24.

The determination as to when bail required is disproportionate in amount to the offense charged does not depend alone upon the amount of money which may have been lost to one party or secured to another by the offense. It depends rather upon the moral turpitude of the crime, the danger resulting to the public from the commission of the offense, and the punishment imposed or authorized by law therefor.[20] So where, as against an accused person, one hundred and sixteen indictments were returned against him for bribery, and the court fixed the bail upon each charge at ten thousand dollars, and the defendant was reindicted, the reindictments being mere restatements of the same offense, it has been held that only nominal bail should be required under the reindictments.[1] Bail in the sum of one hundred and twelve thousand dollars was held not excessive, where the accused was charged with ten distinct felonies, eight being for forgery, one for grand larceny, and another for publishing false returns as an officer of a corporation, it being alleged that the accused received that amount by reason of his commission of the felonies.[2]

§ 19. Increase or Reduction of Bail.—The code provides that

"When the information or indictment is for a felony, and the defendant, before the filing thereof, has given bail for his appearance to answer the charge, the court to which the indictment or information is presented, or in which it is pending, may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order."[3]

And it is also provided that

"After a defendant has been admitted to bail upon an indictment or information, the court in which the charge

20. In re Williams, 82 Cal. 183, 23 Pac. 118 (forgery); Ex parte Ryan, 44 Cal. 555 (assault with attempt to murder).

1. Ex parte Ruef, 7 Cal. App. 754, 96 Pac. 24.

2. Ex parte Duncan, 53 Cal. 410; Ex parte Duncan, 54 Cal. 75.

3. Pen. Code, § 985.

is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased the court may order the defendant to be committed to actual custody, unless he give bail in such increased amount.'"[4]

Proceedings to reduce bail.—The nature of proceedings in bail and the purpose at which they aim require that the authority and discretion of the court having jurisdiction of the offense, or to admit to bail, should be exercised to reduce or increase the amount of bail whenever substantial justice would thereby be promoted.[5] Neither the supreme court nor an appellate court will interfere with the discretion exercised by the court in which the indictment is found, in the matter of fixing the amount of bail, unless it appears, per se, that the amount fixed is unreasonably great, and clearly disproportionate to the offense charged.[6] And where indictments have been returned against the prisoner, charging him with the commission of felonies, the supreme court will presume, for the purpose of the proceeding, on application for reduction of bail, that the petitioner is guilty of the offenses charged; and especially will this be so where the amount was fixed by the committing magistrate and the court in which the indictments are pending refused to reduce the amount.[7] On an application for reduction of bail, the supreme court cannot assume the functions of the court which committed the prisoner, or substitute its own judgment for the judgment of the lower court in fixing the

4. Pen. Code, § 1289 (omitted portion of this section relates to notice. See supra, § 16).

5. Ex parte Ryan, 44 Cal. 555.

6. In re Williams, 82 Cal. 183, 23 Pac. 118 (forgery bail eight thousand dollars); Ex parte Duncan, 54 Cal. 75, and 53 Cal. 410 (forgery, grand larceny and publishing false returns as officer of corporation, bail one hundred and thirteen thousand dollars); Ex parte Ryan, 44 Cal. 555 (assault with attempt to murder, bail fifteen thousand dollars); Ex parte Ruef, 7 Cal. App. 750, 96 Pac. 24 (bribery, one hundred and sixteen indictments, bail ten thousand dollars each. See supra, § 18, as to bail under reindictments in this case).

7. Ex parte Duncan, 53 Cal. 410; Ex parte Ryan, 44 Cal. 555.

amount; but the supreme court is authorized to interfere on such an application if the bail demanded is, per se, unreasonably great and clearly disproportionate to the offense involved.[8] If, however, that court has once passed on an application for reduction of bail and denied the application, it will not, on a second application, depart from its former decision, unless the circumstances on the second application make a case materially different from the one formerly disposed of. But the mere disagreement of the jury intermediate the first and second applications would not, of itself, be a circumstance sufficient to induce the supreme court to reduce the amount.[9]

Deposit in Lieu of Bail.

§ 20. In General.—The code provisions granting the right to deposit money in lieu of bail are as follows:

"A defendant, at any time after an order admitting him to bail, instead of giving bail may deposit with the clerk of the court in which he is held to answer, the sum mentioned in the order, and upon delivery to the officer in whose custody he is, a certificate of the deposit, he must he discharged from custody."[10]

"If the defendant has given bail, he may, at any time before a forfeiture of the undertaking, in like manner deposit the sum mentioned in the recognizance, and upon the deposit being made the bail is exonerated."[11]

"In lieu of a deposit of money, the defendant may deposit bonds of the United States, or of the state of California, of the face value of the cash deposit required, and such bonds shall be treated in the same manner as a deposit of money, except that the clerk shall, under order of the court, when occasion arises therefor, sell the said bonds and apply the proceeds of such sale in the manner that a deposit of cash may be required to be applied."[12]

8. Ex parte Duncan, 53 Cal. 410.
9. Ex parte Duncan, 54 Cal. 75.
10. Pen. Code, § 1295.
11. Pen. Code, § 1296.
12. Pen. Code, § 1298 (new section added April 30, 1919. Stats. 1919, p. 240).

The fact that money to be used in lieu of a bail bond was received and receipted for originally by the sheriff does not affect its legal status, where it was received by the clerk in lieu of bail and the prisoner was permitted to go at large because of such deposit.[13]

§ 21. Application of Deposit to Judgment or Fine.— The Penal Code provides that,

"When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the county clerk must, under the direction of the court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant."[14]

The section above set out is not unconstitutional as depriving a person of property, without due process of law, by placing him in different and less advantageous position than a surety on a bail bond, there being no constitutional reason why one who advances cash in lieu of bail should occupy the identical position of a surety on a bail bond. It attributes ownership of such fund to the defendant, and one who advances money for release of a prisoner held under a criminal charge is presumed to know that fact. This principle is sustained by the weight of authority. Money deposited with the clerk in lieu of bail is a fund remaining on deposit "at the time of a judgment, for the payment of a fine," if not sooner discharged or remitted, and should be disposed of in accordance with the code provision.[15] If a surplus remains after satisfaction of the fine and costs, it must be refunded.[16] And where cash bail was deposited for the release of a defendant charged with an offense triable in the superior court, and the clerk, as ordered by the court, satisfied the part of the judgment imposing a fine out of

13. Mundell v. Wells, 181 Cal. 398, 7 A. L. R. 383, 184 Pac. 666.

14. Pen. Code, § 1297.

15. Mundell v. Wells, 181 Cal. 398, 7 A. L. R. 383, 184 Pac. 666.

16. La Porte v. Williams, 17 Cal. App. 428, 120 Pac. 55.

such bail money, neither the person who put up the bail nor a judgment creditor of the defendant has any recourse against the clerk for the recovery of the money thus applied, for the court has jurisdiction of the subject matter and could order the disposition of the money in custodia legis.[17]

§ 22. Return of Deposit.—The Penal Code provides that if a motion to set aside an indictment is granted, the court must, if the defendant has deposited money instead of bail, "order that the same be refunded to him, unless it directs that the cause be resubmitted to the same or another grand jury," etc.[18] And it is provided that the deposit must be refunded if the defendant at any time before the forfeiture thereof, surrenders himself to the officer to whom the commitment was directed,[19] or if the bail surrender the defendant in their exoneration.[1]

It has been held that an offer of the defendant to surrender himself is a prerequisite to the return of the money under section 1302 of the Penal Code. A mere request of his attorney on behalf of third persons who advanced the money deposited that defendant, who was present in court, on his appearance for sentence, be surrendered, and that the money deposited be remitted to such third persons, which request the court did not act upon, but pro-

17. Mundell v. Wells, 181 Cal. 398, 7 A. L. R. 383, 184 Pac. 666. See infra, § 23, as to deposit by third person as surety.

18. Pen. Code, § 997.

"If the court directs the cause to be resubmitted, or an information to be filed, the defendant, if already in custody, must so remain, unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information; and, unless a new indictment is found or information filed before the next grand jury of the county is discharged, the court must, on the discharge of such grand jury, make the order prescribed by the preceding section." Pen. Code, § 998.

19. Pen. Code, § 1302 (in part).

1. See Pen. Code, §§ 1300, 1301.

ceeded to pronounce sentence upon defendant, is not sufficient to effect release of the deposit.[2]

The code further provides for a return of the deposit on an arrest of judgment, "if no evidence appears sufficient to charge him [defendant] with any offense";[3] or where the jury is discharged, "because the facts as charged do not constitute an offense punishable by law, . . . or if he [defendant] has deposited money instead of bail, that the money be refunded to him, unless in its [the court's] opinion a new indictment or information can be framed upon which the defendant can be legally convicted," etc.;[4] or where, the defendant is committed to a state hospital upon the finding of the jury that he is insane;[5] or where the defendant is committed upon a general or special verdict;[6] or where "a judgment against the defendant is reversed without ordering a new trial."[7]

§ 23. Deposit Made by Third Person or by Surety.— Money deposited in lieu of bail will be presumed to be the property of the defendant for all legal purposes, although it may have been furnished by another or others, and the court is not required to protect the supposed rights of anyone who may have advanced it for the defendant; yet in a contest involving the residue of a deposit in the hands of the clerk, after payment of the fine, the court will inquire into who is entitled to the money, as between the one who put it up and a judgment creditor of the defendant.[8] Although the Penal Code, sections 1295 to 1302, inclusive, do not seem to cover cases in which money has been deposited in lieu of bail by one other than the defendant, yet where one who had ad-

2. Mundell v. Wells, 181 Cal. 398, 7 A. L. R. 383, 184 Pac. 666.

3. Pen. Code, § 1188 (in part).

4. Pen. Code, § 1117 (in part).

5. See Pen. Code, § 1371.

6. See Pen. Code, § 1166.

7. Pen. Code, § 1262 (in part).

8. Mundell v. Wells, 181 Cal. 398 7 A. L. R. 383, 184 Pac. 666 (citing authorities from other jurisdictions to the rule declared that the money is deposited as the money of the defendant, and if a fine is inflicted, it may be applied to its payment). See supra, §§ 21, 22.

vanced money for deposit to secure a prisoner's release appeared in court with the prisoner on the day set for trial and offered to surrender him, and demanded the return of the money deposited by him, and after refusal of the court to accept such surrender, and imposition of a fine upon a plea of guilty, the depositor again offered to surrender defendant into custody and again demanded the return of the money deposited by him, which the court refused, ordering the deposit to be applied in satisfaction of the fine, it has been held that the depositor did all that was required of him to entitle him to a return of his money, and the order for application of the deposit to the payment of the fine was without authority.[9]

Deposit by surety to secure cosurety.—The deposit by one surety on a bail bond of money or property with a trustee to secure his cosurety on the bond is not provided for or regulated by statute. The people have no claim on such a deposit, it not being intended that it should stand in lieu of bail, and they are not parties to the bailment. Where, therefore, the surety for whose benefit the money or property was deposited released all claim upon the deposit, and directed the trustee to deliver the same to the surety who made the deposit, it has been held that the trustee could not legally refuse to do so, notwithstanding there was a judgment in force upon the bail bond.[10]

The Undertaking of Bail.

§ 24. The Undertaking—Distinguished from Recognizance.—A prisoner is admitted to bail by a written undertaking, executed by two sufficient sureties (with or without the defendant, in the discretion of the magistrate) and acknowledged before the court or magistrate

9. Hudson v. Police Court of City of Oakland, 39 Cal. App. 149, 178 Pac. 172. And see Mundell v. Wells, 181 Cal. 398, 7 A. L. R. 383, 184 Pac. 666 (distinguishing Hudson v. Police Court of Oakland, supra).

10. Skidmore v. Taylor, 29 Cal. 619.

in substantially the form prescribed by the code.[11] In criminal proceedings, the bail bond is purely statutory, and must conform to the statute and the order of the court, and, if it fails to do so, it is not good, even as a common-law obligation.[12]

Qualifications of bail.—As to qualification of bail for a prisoner held to answer before indictment, the code provides as follows:

(1) "Each of them must be a resident householder or freeholder within the state; but the court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered. (2) They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of sufficient bail."[13]

The same provisions apply to bail after indictment,[14] upon recommitment,[15] and upon appeal.[16] The proposed sureties may be put upon oath, and witnesses may be examined relative to their qualifications. The district attorney should be allowed to bring in witnesses and examine them fully, and to examine the offered sureties, and all reasonable means of investigation allowed, but no unreasonable delay should be granted. Neither friends nor relatives of the prisoner are excluded by the statute, and the court has no power arbitrarily to refuse them as bail, for the sole reason that they are friends or relatives. As to property qualification of bail, the property owned by the bail may consist of real or personal property, or both, in the county or elsewhere. Its situation may be

11. Pen. Code, §§ 1278, 1287, 1316 (prescribing forms for the undertakings of bail).

12. Merced County v. Shaffer, 40 Cal. App. 163, 180 Pac. 342; San Francisco v. Hartnett, 1 Cal. App. 652, 82 Pac. 1064. See infra, § 27. As to statutory bonds good as common law obligations generally, see BONDS.

13. Pen. Code, § 1279.

14. See Pen. Code, § 1288.

15. See Pen. Code, § 1317.

16. See Pen. Code, § 1292.

inquired into for the purpose of testing the truth as to whether or not the surety really owns the property; and the courts, in all cases, should be careful not to accept fictitious or worthless bail, or to accept persons as sureties who are not financially responsible. Under the constitutional provision that excessive bail shall not be required, the legislature cannot prescribe such burdensome rules as to sureties and their right to qualify as such, that the prisoner would be deprived of his constitutional right to be admitted to bail upon giving sufficient sureties.[17]

Distinguished from recognizance.—A distinction is sometimes drawn between a bail bond and a recognizance which affects the character of the undertaking, inasmuch as the nature of bail requires sureties, for it is to them that the body of the defendant is delivered, although he, also, is required to obligate himself to appear and answer; whereas a recognizance is a common-law obligation, and by the common law the sureties may be bound separately from their principal, or without the principal being bound at all.[18] But as the statute provides that the undertaking for bail may be executed "with or without the defendant, in the discretion of the magistrate," it is apparent that the bail or recognizance may be good though the defendant do not join therein.[19] And this was the rule under the Practice Act.[20] In ordinary practice a defendant charged with a minor offense is often released upon his own recognizance where the probability of an attempt to escape is slight.[1]

§ 25. Justification of Bail—Discharge of Prisoner.—It is required by the code that "the bail must in all cases justify by affidavit, taken before the magistrate, that they each possess the qualifications provided" by the code. And "the magistrate may further examine the bail under

17. Ex parte Ruef, 8 Cal. App. 468, 97 Pac. 89.

18. See 3 Ruling Case Law, p. 32. See SURETYSHIP.

19. See Pen. Code, §§ 1278, 1287.

20. People v. Love, 19 Cal. 676.

1. 3 Ruling Case Law, p. 32.

oath concerning their sufficiency in such manner as he may deem proper."[2] If the judge or magistrate does not further examine the sureties, it will be presumed that he was satisfied upon the question of their qualifications and sufficiency as sureties by their affidavits.[3] The judge or magistrate is not required, however, to indorse his approval upon the bond, as the justification forms no part of the contract of the sureties, and in no manner affects their liability.[4] Moreover, if the justification of the sureties is insufficient, they cannot avail themselves of this fact, as it is wholly immaterial for the purposes of an action upon a forfeited recognizance whether there was any justification or not.[5] In this respect there is no distinction between bail bonds and undertakings generally.[6] And by parity of reasoning it has been held that an acknowledgment is not a part of the contract.[7] It follows that in a suit on a bail bond, the sureties cannot set up as a defense the fact that the amounts in which they justified were insufficient under the statute.[8]

Discharge of prisoner from custody.—The code provides that

"Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged."[9]

In view of this section of the code, a prisoner arrested for a bailable offense is entitled to release from custody

2. See Pen. Code, § 1280.

3. People v. Penniman, 37 Cal. 271.

4. Carpenter v. Furrey, 128 Cal. 665, 61 Pac. 369; Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296; Murdock v. Brooks, 38 Cal. 596; People v. Shirley, 18 Cal. 121; People v. Carpenter, 7 Cal. 402; People v. Penniman, 37 Cal. 271.

5. People v. Carpenter, 7 Cal. 402.

6. People v. Shirley, 18 Cal. 121 (per Field, C. J., quoted and approved in Murdock v. Brooks, 38 Cal. 596). See BONDS.

7. People v. Lepori, 35 Cal. App. 60, 169 Pac. 692, 694. See infra, § 27, as to acknowledgment.

8. People v. Shirley, 18 Cal. 121.

9. Pen. Code, § 1281.

upon the execution of a written bail bond in proper form, in the prescribed amount, by two sureties, and their justification before a magistrate or judge, as prescribed by the code. In such event it is the duty of the magistrate immediately to deliver the bond to the officer having the prisoner in custody, and thereupon it is the duty of such officer to release the prisoner and return the warrant with the bond to the clerk of the court from which the warrant was issued.[10]

§ 26. Recitals in and Terms of Bond—Onerous Provisions.—There are two lines of decisions in regard to the necessity that the bail bond contain a description of the offense; one holding that the bond is valid, although it does not contain a description of the offense, the sureties being presumed to know the charge against the prisoner; the other, which appears to be supported by the weight of authority, that the bond must contain a description of the offense with which the prisoner is charged, as a means of identifying the case and informing the principal and the sureties of the obligations to be assumed.[11] In California, the code prescribes a form of bail bond which must be substantially followed, and which requires a brief statement of the nature of the offense.[12] But it is not necessary that the bail bond describe the offense with the same particularity as is required in an indictment.[13] Where such bond contains a recital of the order

10. People v. Penniman, 37 Cal. 271.

11. 3 Ruling Case Law, p. 37.

12. Pen. Code, §§ 1278, 1287 (but it should be noted that the statutory form of bail bond set forth in section 1316, where bail is taken upon recommitment of the defendant, does not provide for description of the offense).

13. San Francisco v. Randall, 54 Cal. 408. A bail bond which described the offense as the stealing of "two head of cattle" of a certain value, sufficiently designated the offense charged; and the ownership of the property sufficiently appeared, where it was stated that they were the property of "Page Bros.," it being stipulated that "Page Bros." was the name of a partnership consisting of certain named persons. People v. Barnes, 65 Cal. 16, 2 Pac. 493. See People v. Lepori, 35 Cal. App. 60, 169 Pac. 692, 694 (holding that there is no

admitting the accused to bail and the amount of bail, such recital is conclusive upon the sureties.[14]

Onerous provisions in bond.—Where the conditions of a bail bond set out in a complaint are much at variance with those contemplated by the statute in bonds of this character, the rule is that the undertaking is invalid.[15] In this connection it has been held that a bail bond given after conviction and pending appeal which provides that in case the judgment against the defendant be affirmed or modified, or the appeal be dismissed, the accused will pay the fine and render himself to the justice "in execution of said judgment of thirty days' imprisonment," and obey the orders and processes of the justice's court in fulfillment of the judgment, and in case a new trial is ordered that defendant will appear in the superior court and submit himself, etc., is more onerous than the code requires, in that it promises that in case the judgment be affirmed or modified, defendant will render himself to the justice court in execution of the full sentence of imprisonment, whereas the statute only requires the condition that he will surrender himself in execution of the judgment on its being affirmed or as modified.[16] Applying the rule, it has been held, however, that a bail bond which stipulates that accused "will appear and answer the charge above mentioned" is not subject to the objection, on suit to enforce the bond, that it is more onerous than the law requires, as the word "charge" as there used means nothing more or different than the information filed against him. And even if the informa-

material variance where the information charges defendant with grand larceny from the person, under section 487, subdivision 2, of the Penal Code, while the bail bond designates the offense as grand larceny in general terms).

14. San Francisco v. Randall, 54 Cal. 408. See infra, § 28, as to liability of sureties.

15. See cases cited infra.

16. People v. Barrett, 6 Cal. App. 578, 92 Pac. 647 (this construction was given, though, as the court itself points out, "the judgment was affirmed in its entirety and defendant did not render himself in execution").

tion states a different offense, such fact, it is said, would not be a good defense in an action on the bond.[17]

In a case where there is a substantial departure from the requirements of the order of the court fixing the amount of bail, and, in this, an excess in the amount named in the order, the sureties cannot be held liable. And so it has been held that a bail bond is defective and void where the order of the court provides that the defendants be admitted to bail in the sum of five hundred dollars each, and the bond as given purports to be on behalf of both defendants, and provides that if the conditions are not performed, "that he or they will pay to the people of the state . . . the sum of one thousand dollars," thus obligating themselves to pay such sum if either or both of the defendants fail to appear, whereas the order required a penalty of only five hundred dollars for each defendant.[18]

§ 27. Formal Requisites Generally—Reforming Bail Bond.—The code contains forms for bail bonds, and provides that the bond shall be substantially in the forms prescribed therein.[19] The form of bond prescribed by section 1278 of the Penal Code applies to bonds to be given as well where the accused is to appear before a magistrate for examination as where he is held to answer after examination; and although the form prescribed contains words which have no application to bail given pending examination, namely: "And if convicted will appear for judgment and render himself in execution thereof," they do not vitiate such a bond, as they may be treated as surplusage, and enough will be left to cover the obligation in such an undertaking.[20] While, as a general rule, a bail bond being purely statutory, must conform to the statute,[1] and to the order of the court

17. People v. Lepori, 35 Cal. App. 60, 169 Pac. 692, 694.

18. Merced County v. Shaffer, 40 Cal. App. 163, 180 Pac. 342.

19. Pen. Code, §§ 1278, 1287, 1316.

20. San Francisco v. Randall, 54 Cal. 408.

1. See supra, § 24.

fixing the amount of bail,[2] they are not required, however, to be in exact conformity to the statute. It is sufficient if they are substantially so.[3] Accordingly, the use of the word "penal" in describing the obligation of the sureties was held not to vitiate the bond. And a bail bond is not invalid because it is made payable to the "state of California" instead of to the "people of the state of California," as both terms describe the same party, and the use of either in a bond is sufficient, although the statute uses the other term.[4] A bond need not name the court in which the accused is required to appear, as the law provides in what courts such offenses are triable, and the law must be read into the undertaking.[5]

Acknowledgment and certificate thereof.—Under the code requiring a bail bond to be acknowledged before the court or magistrate in substantially the form prescribed therein, a certificate of acknowledgment is not necessary to the validity of the bond, but is merely a mode of proof of the acknowledgment, and not the only method of proving such fact.[6]

Reforming bail bond in equity.—While an action will lie to enforce the obligations of a valid bail bond, an invalid bail bond cannot be reformed in equity, and enforced as reformed. So, where a bail bond is invalid, in that it does not contain an undertaking by the bail to answer for any default of the accused, but contains an

2. See supra, § 17.

3. Cases cited infra. See People v. Eaton, 41 Cal. 657 (holding that a variance between the indictment and the bail bond, as to the name of the defendant, he being named Martini in the indictment and Martinez in the bond, does not vitiate the bond, where there is testimony that the same person who was held to answer as Martinez was indicted by the name of Martini).

4. People v. Love, 19 Cal. 676. See infra, § 34, to the effect that an action upon a bail bond may be brought in the name of the people of the county, or in the name of the people of the state.

5. People v. Carpenter, 7 Cal. 402.

6. Pen. Code, § 1287; People v. Lepori, 35 Cal. App. 60, 169 Pac. 692, 694. See ACKNOWLEDGMENTS, vol. 1, p. 250.

undertaking only that the accused will pay to the state the amount named in the bond in case of default in its conditions, and also for failure of the bond to conform to the order of the court for admission to bail, in that the bond sought to obligate the bail for a greater amount than the order required, it cannot be reformed on the ground of mistake, and then enforced as thus reformed.[7]

Liability of Bail.

§ 28. In General—When Liability Attaches.—The Civil Code provides that "The obligations of bail are governed by the statutes specially applicable thereto."[8] The rights and liabilities of sureties on bail bonds are in many respects different from those of sureties on ordinary bonds or commercial contracts. For instance, the sureties on a bail bond can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. While sureties on ordinary bonds and commercial contracts can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar, as both have the right to stand upon the very terms of their undertaking.[9] Sureties on bail bonds cannot be held liable beyond the terms of the contract of suretyship, and they have the right to declare in their bond the terms and conditions upon which they shall be bound, and to stand upon the

7. Merced County v. Shaffer, 40 Cal. App. 163, 180 Pac. 342.

8. Civ. Code, § 2781.

See infra, § 37, to the effect that the obligations of bail are assumed with reference to the law, which becomes a part of their contract, and the whole statute must be examined to determine their liability.

9. Reese v. United States, 76 U. S. (9 Wall.) 13, 19 L. Ed. 541 (Case arising in California. Decision in the United States supreme court by Justice Field). See SURETYSHIP.

terms of such contract.[10] Hence, it was held that where a bail bond provided for the appearance of the accused at the next regular term of the court, and from term to term until the cases were disposed of, the provision had reference to such subsequent terms as might follow in regular succession in the business of the court, and that by such a provision the sureties were not bound for his appearance at a term years later.[11]

When liability attaches.—The responsibility of sureties upon the bail bond attaches the moment the prisoner is released upon such recognizance, and their liability is fixed by a breach of its conditions, and forfeiture may be declared and entered by the proper court.[12] And an oral order of the police judge from the bench, upon the giving of the bond, that the prisoner be released, certified by the clerk to the keeper of the prison, and followed by the release of the prisoner, has been held to be a sufficient compliance with section 1281 of the Penal Code, and renders the bond obligatory.[13] The liability of the sureties attaches independently of their justification,[14] or of the certificate of their acknowledgment.[15]

Discharge or Exoneration of Bail.

§ 29. In General—Surrender of Defendant Generally.—The Penal Code provides that:

"At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration,

10. San Luis Obispo County v. Ryal, 175 Cal. 34, 165 Pac. 1 (holding that a bail bond is invalid and does not bind the sureties, which does not provide that the sureties shall pay anything in default of their principal, but provides that the principal shall pay a certain sum in case of his default). Merced County v. Shaffer, 40 Cal. App. 163, 180 Pac. 342; Reese v. United States, 76 U. S. (9 Wall.) 13, 19 L. Ed. 541 (case arising in California).

11. Reese v. United States, 76 U. S. (9 Wall.) 13, 19 L. Ed. 541.

12. People v. Penniman, 37 Cal. 271.

13. San Francisco v. Randall, 54 Cal. 408.

14. See supra, § 25.

15. See supra, §§ 25–27.

or he may surrender himself, to the officer to whose custody he was committed at the time of giving bail."[16]

"For the purpose of surrendering the defendant, the bail, at any time before they are finally discharged, and at any place within the state, may themselves arrest him, or, by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so."[17]

As provided by the code, one mode of exonerating the bail is by surrender of the defendant into legal custody. Upon release of the prisoner on bail, he is in the custody of his bail, and the consideration of the bond, accruing to the bail, is his freedom from any other custody, since the responsibility of the bail is based upon their custody of the person bailed and their rights and powers as his custodians. If they are at any time fearful that he may not appear, they can arrest him or have him arrested and surrendered, or he may surrender himself; and in either event the bail are exonerated.[18] The fact that the accused is in the custody of the sheriff for only a short time is immaterial. "It makes no difference whether the time was ten minutes or ten months."[19] However, a surrender by the sureties cannot be made solely for the purpose of working an imprisonment of the accused upon which to base an application for writ of habeas corpus.[20]

§ 30. Other Modes of Exonerating Bail.—Under the Penal Code, the bail are exonerated if a motion to set aside the indictment is sustained, and if money has been deposited in lieu of bail, it must be refunded, unless the court directs that the case be resubmitted to the grand jury, or that an information be filed by the district at-

16. The manner of effecting his surrender is prescribed by the statute. See Pen. Codes, §§ 1300, 1301.

17. Pen. Code, § 1301.

18. See supra, § 29, and infra, § 35; and see Pen. Code, § 1300; People v. McReynolds, 102 Cal. 308, 36 Pac. 590.

19. People v. McReynolds, 102 Cal. 308, 36 Pac. 590 (per McFarland, J.).

20. Matter of Ford, 160 Cal. 334, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882, 116 Pac. 757. See HABEAS CORPUS.

torney.[1] And the same rule applies on dismissal of the action;[2] where a demurrer is sustained to an indictment or information;[3] and if the defendant was not arrested on a warrant from the proper county.[4]

In every undertaking of bail there is an implied agreement on the part of the obligee not to interfere with the relation existing between the bail and the defendant or principal, and any interference on the part of the obligee, whereby the rights of the bail are interfered with and their liability rendered more hazardous, exonerates the bail from liability. So, too, where by an act of the obligee it is made impossible for the bail to exercise their right of arrest and surrender of accused this is an undue interference with the rights of the bail, and exonerates them from liability on the bond.[5] It has been held, where the accused, who was released on bail, was under order of the court taken into custody by the sheriff for a short time and then released upon rescission of the order by the court, that this operated as a release of the bail, inasmuch as the vacation of the order did not, by operation of law, restore the accused to the custody of his bail. In that case the court said: "The theory upon which the case seems to have been decided, that bail should have shown affirmatively that the custody of the sheriff prevented them from afterward producing . . . [the accused], is not sound."[6]

Forfeiture of Bail or Money Deposited.

§ 31. General Rule.—In reference to forfeiture, the Penal Code provides as follows:

"If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or

1. Pen. Code, § 997 (stated in substance).
2. See Pen. Code, § 1384.
3. Pen. Code, § 1009 (stated in substance).
4. See Pen. Code, § 1116.
5. Reese v. United States, 76 U. S. (9 Wall.) 13, 19 L. Ed. 541.
6. People v. McReynolds, 102 Cal. 308, 36 Pac. 590.

upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, must thereupon be declared forfeited. But if at any time within twenty days after such entry in the minutes, the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just."[7] "If the forfeiture is not discharged, as provided in the last section, the district attorney may, at any time after twenty-one days from the entry upon the minutes, as provided in the last section, proceed by action against the bail upon their undertaking."[8]

In addition to declaring such forfeiture, the court may, when the personal presence of the defendant is necessary, direct the clerk to issue a bench-warrant for his arrest on his failure to appear for arraignment,[9] or, as the case may be, for judgment.[10]

Payment into county treasury.—If the forfeiture is not discharged or remitted as contemplated in the code provisions considered above, the clerk must, at the end of thirty days, pay over money deposited to the county treasurer.[11] So, where one was arrested on a felony charge and brought before a city recorder, who, under the statute, is clothed with the functions of a magistrate, and the accused deposited money, instead of giving bail, to secure his appearance for examination, but failed to appear for such examination, and the recorder ordered forfeited the money so deposited, it was held to be the duty of the recorder to pay the deposit into the county treasury, under Penal Code, section 1307, and not to the city treasurer under sections 1457 and 1470, requiring payment into the

7. Pen. Code, § 1305.

8. Pen. Code, § 1306; People v. Carpenter, 7 Cal. 402. See infra, §§ 33–36, as to proceedings in such actions.

9. See Pen. Code, § 979.

10. See Pen. Code, § 1195.

11. See Pen. Code, § 1307.

city treasury of forfeitures in police or justices' courts of the city. In such case the recorder acted as an agent of the state, and not in a judicial capacity, and could be held liable at the suit of the county for the deposit which he paid into the city treasury, although the payment was made in good faith.[12]

Right to subject trust property conveyed as security for bail.—Property conveyed by the accused in trust to secure his bail in case the bond should be forfeited and they become liable thereon cannot be subjected, on forfeiture of the recognizance, to payment of the sum named therein, in advance of the determination of the liability of the sureties, and their ability and willingness to pay the sum named in the bond. If, after judgment against the bail, it is made to appear that they are insolvent, the question might then be raised as to the right to subject such property as the property of the accused. But the execution of the trust deed and the agreement contained therein in no wise affects the liability of the bail on the bond.[13]

§ 32. Limitation of Rule as to Forfeitures.—It has been held that section 1305 of the Penal Code relates only to cases where the defendant or his sureties are able to come before the court and satisfactorily excuse defendant's neglect to appear.[14] Where one accused of a felony gives bail for his appearance for examination in a justice court, and the court hears the argument on the demurrer to the complaint at the hour set for examination, the further hearing of the demurrer after the time set for the examination is in effect a continuance of the examination until the argument on the demurrer is concluded, and the bail bond cannot be forfeited for failure of defendant to pre-

12. Tulare County v. Fenn, 32 Cal. App. Dec. 184, 190 Pac. 855.

13. People v. Skidmore, 17 Cal. 260. See supra, § 28 et seq., as to liability of sureties generally.

14. People v. McReynolds, 102 Cal. 308, 36 Pac. 590. See supra, § 31, for the wording of Pen. Code, § 1305.

sent himself until after the demurrer is disposed of. In such a case it has been held that the motion of the district attorney, pending such argument, to forfeit defendant's bail bond because of his failure to be present in court at the hour set for the examination was properly overruled.[15] In case of a misdemeanor, in view of Penal Code, section 1043, prescribing when defendant must be personally present at the trial and when his presence may be dispensed with, and sections 977 to 979 of the code, relating to the personal appearance of defendant for arraignment, the defendant need not be personally present at the trial, in the absence of an application by the district attorney that the personal attendance of the accused be required. In such case it has been held that the absence of the accused when the case was called for trial did not constitute cause for declaring his bond forfeited.[16] In an early case construing analogous sections of the Criminal Practice Act it was held that a defendant charged with a misdemeanor, may appear by attorney and enter his plea of not guilty, and his appearance only by attorney is not ground for forfeiting his recognizance.[17]

Actions on Bail Bonds.

§ 33. Complaint.—A complaint in an action on an undertaking or recognizance to appear and answer an indictment, should aver that an indictment was found or pending;[18] that after the order by the judge of the court, fixing the bail of accused at a certain sum the accused appeared before said judge and executed with his sureties the bond in suit, in which undertaking they agreed to pay to the people of the state a certain sum on the breach of its conditions by accused;[19] the record of such recog-

15. People v. Morstadt, 101 Cal. 379, 35 Pac. 1007.

16. People v. Budd, 57 Cal. 349.

17. People v. Ebner, 23 Cal. 158 (construing Crim. Prac. Act, §§ 259, 320, 415).

18. People v. Smith, 3 Cal. 271.

19. County of Los Angeles v.

nizance or undertaking;[20] that upon the giving of the bond the accused was released from custody by reason of the execution and delivery of the bond sued on;[1] the breach of the bond sued on;[2] and the order of forfeiture.[3] Accordingly, a complaint in substance as follows, states a cause of action on a bail bond executed in a criminal case, to wit: That the defendants executed the bond in suit; that accused appeared at the first term of court thereafter and pleaded not guilty, and the case was continued to the next term of court, at which time the case was called for trial and accused did not appear, and the bail, although called, did not produce the body of accused; that the court then made an order forfeiting the recognizance; and that the bail did not produce the body of the accused before the final adjournment of the court.[4] Where the complaint, in an action on a bail bond, given in a criminal case, alleged, after setting out the cause of action on the bond, that the accused, in order to secure his sureties, executed a trust deed to certain property,

Babcock, 45 Cal. 252. See People v. Love, 19 Cal. 676 (holding that the complaint showed with sufficient certainty that the bond was taken by an officer competent to take the recognizance).

20. In such an action it is necessary to allege in the complaint that the recognizance sued on is of record, since a recognizance must be a matter of record, and cannot exist apart from the record. Mendocino County v. Lamar, 30 Cal. 627. See supra, § 2.

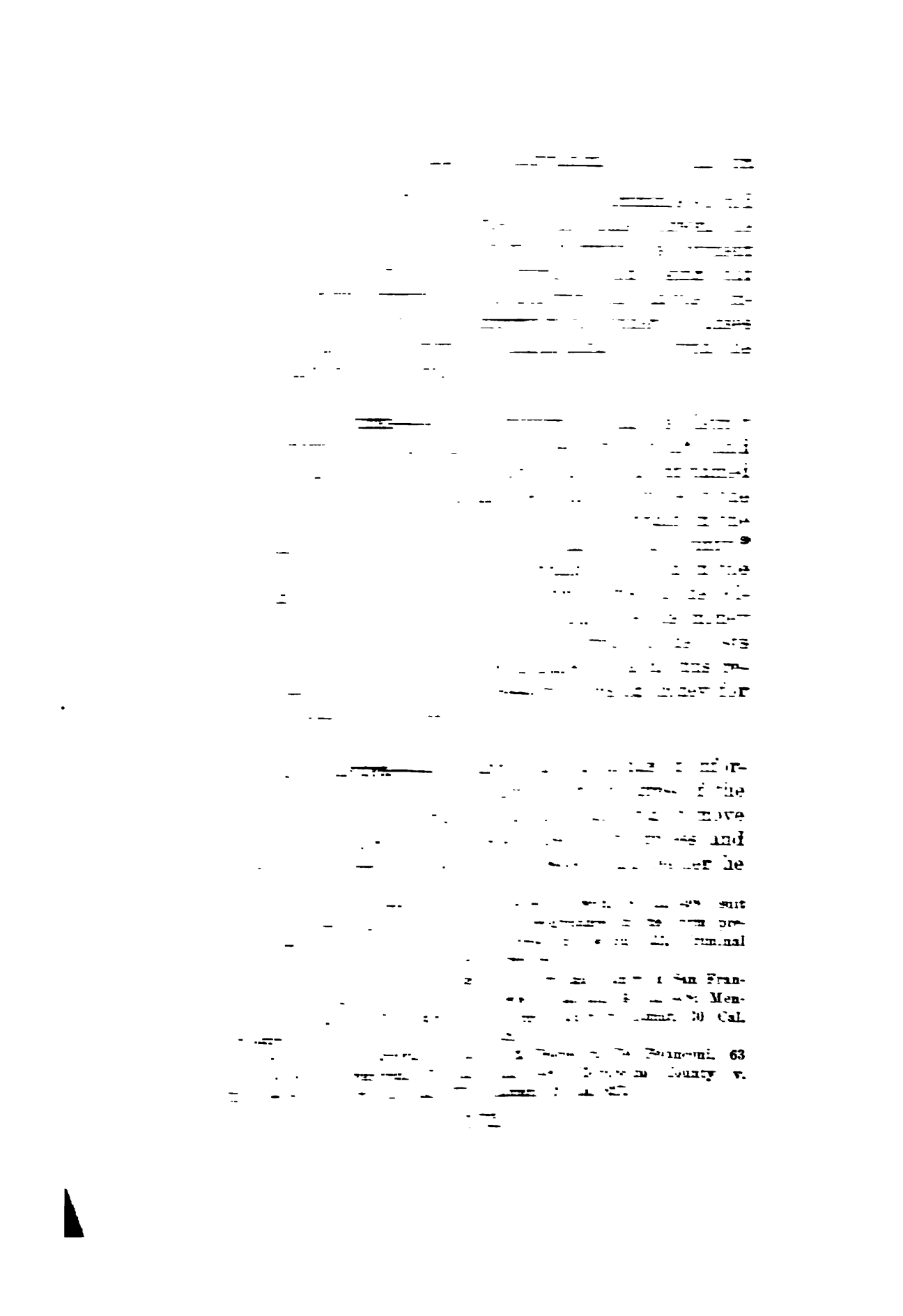
1. County of Los Angeles v. Babcock, 45 Cal. 252; People v. Bellafont, 11 Cal. App. 492, 105 Pac. 426.

2. People v. Smith, 3 Cal. 271.

A breach of the bond sued on is shown by the averment that the case was regularly set for trial on a certain day in a named court, and on said day the case was duly called for trial in such court; but that accused, having theretofore been duly advised of the time and place of the trial, then and there failed to appear for trial. People v. Bellafont, 11 Cal. App. 492, 105 Pac. 426.

3. See cases cited infra.

4. People v. Smith, 18 Cal. 498 (holding that the objection that the offense charged was a misdemeanor, entitling the accused to appear by attorney cannot avail anything, where there is nothing to show that accused offered to so appear). And see People v. Love, 19 Cal. 676 (for complaint held sufficient).



nor third parties can set up such irregularities or defects as a defense to an action on the bond.[11] Neither can the bail set up as a defense to such an action the fact that the amounts in which they justified were insufficient under the statute;[12] or that there was not a justification of the sureties;[13] or that there was a variance between the name of the accused in the indictment and in the bail bond, where the variance is sufficiently accounted for to justify the court in finding that the person indicted and the person named in the bail bond are the same person.[14]

It is not a matter of defense that after the accused was admitted to bail, his bail was raised by the court, and that the officers of the law negligently permitted him to hear of the order of arrest, and by reason thereof he absconded before he could be rearrested, and that the order of arrest was concealed from the bail.[15] But if a forfeiture has been discharged, it is a matter of defense to be brought forward by answer.[16] And the defendants in an action on a recognizance may take advantage of the fact that it is not a matter of record, as a recognizance is an obligation of record;[17] or that there was a fatal variance between the indictment and the bond in the matter of designating the offense.[18] Likewise, the bail can take advantage of the fact that they did not agree to pay a certain sum to the state, on default of the principal, but that the undertaking was that "he," the accused, would pay to the state the sum named in the bond.[19]

§ 36. Judgment.—The fact that a judgment on a bail bond was rendered against the principal and the sureties,

11. Matoon v. Eder, 6 Cal. 57.

12. People v. Shirley, 18 Cal. 121; People v. Carpenter, 7 Cal. 402.

13. People v. Carpenter, 7 Cal. 402.

14. People v. Eaton, 41 Cal. 657.

15. People v. Eaton, 41 Cal. 657.

16. People v. Love, 19 Cal. 676.

17. Mendocino County v. Lamar, 30 Cal. 627.

18. People v. Hunter, 10 Cal. 502 (It does not follow that the indictment was for the same offense mentioned in the recognizance, in the absence of anything to show such fact).

19. San Luis Obispo County v. Ryal, 175 Cal. 34, 165 Pac. 1.

when the principal was not served with summons and did not appear, does not render the judgment invalid as to the sureties, its invalidity as to the principal, who is not complaining, not being a matter of concern to the sureties.[20] It is not required that an application by bail for relief from a judgment in an action on the bond be in any particular form, or by any particular proceeding. It may be made by petition or otherwise. Neither is it required that the words "mistake, inadvertence, and excusable neglect" be employed in the application; only the facts should be set forth, and if they show a case coming within the rule, it is sufficient. In a case where the accused appeared at the proper term following the return of the indictment, and moved to quash the indictment, and the court sustained the motion, and the following day another indictment was found on the same charge, at the same term, and on the same day the accused was called and made default, and afterwards, in an action on the bond, judgment was obtained against the bail, it was held that they were entitled to relief against the judgment.[1]

Principles relating to appeal and review of judgments in actions upon bail bonds, in common with actions generally, are considered in another article of this work.[2]

III. Bail in Civil Cases.

§ 37. Right to Bail Generally.—Only in a limited number of instances may an arrest be effected in a civil action.[3] The constitutional provision relating to bail and

20. People v. Worth, 4 Cal. Unrep. 121, 33 Pac. 913. See SURETYSHIP.

1. People v. Lafarge, 3 Cal. 130.

2. See APPEAL AND ERROR, vol. 2, p. 82. See People v. Wolf, 16 Cal. 385 (holding, under the earlier practice in this state, that in an action in the district court on a recognizance given and forfeited in the court of sessions, the district court cannot review the finding of the court of sessions that accused made no appearance, as it would amount to a retrial of the question passed upon by the court of sessions, or to an indirect appeal from its decision).

3. See ARREST, vol. 3, p. 140.

set out in section 3 of this article applies to civil as well as to criminal cases, but of course the exception contained therein can have no application to civil cases. So it must follow that all persons arrested in civil cases are entitled to bail, upon giving bond with sufficient sureties, or upon deposit of the required security in lieu of bail.[4] For example: One who is arrested under a provision of the Political Code,[5] and charged with being so far addicted to the intemperate use of stimulants as to have lost the power of self-control, and that by reason thereof such person is a fit subject for commitment to a state hospital for the care and treatment of the insane, is entitled to admission to bail under the constitutional provision relating to bail,[6] pending investigation of the charge, notwithstanding the provisions of such statute that the peace officer to whom the warrant is delivered "must thereupon arrest and detain such person until a hearing and examination can be had."[7]

In contempt proceedings.—In reference to bail in contempt proceedings the code provides as follows:

"Whenever a warrant of attachment is issued pursuant to this title [contempts], the court or judge must

4. See Code Civ. Proc., § 486. And see infra, §§ 39, 40.

5. Pol. Code, § 2185c (Act Aug. 8, 1915, Stats. 1915, p. 839), providing for commitment of inebriates and drug habitues to state hospitals.

6. Const. 1879, art. I, § 6 (see supra, § 3).

7. In re Henley, 18 Cal. App. 1, 121 Pac. 933. As stated by Justice Field in People v. Tinder, 19 Cal. 539, 542, 81 Am. Dec. 77: "In all other cases [except when the accused is charged with a capital offense—and even then, unless the proof of guilt is evident or the presumption great] the admission to bail is a right which the accused can claim, and which no judge or court can properly refuse." In the Hurley case, supra, the court said: "There might be instances under this statute where, for the safety of the individual or of society, it would be proper to deny bail." However, this expression of the court was mere obiter. It would seem that if bail should for any reason be denied in such a case, it would be making an exception to the constitutional right to bail not found in the constitution, as the constitution creates only one exception, namely, capital cases where the proof is evident, or the presumption great.

direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such indorsement."[8]

"When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon; he must be discharged from the arrest, upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return day of the warrant and abide the order of the court or judge thereupon; or that they will pay as may be directed, the sum specified in the warrant.[9]

"The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein."[10]

§ 38. Proceedings for Admission to Bail—The Undertaking.—The Civil Code provides that "The obligations of bail are governed by the statutes specially applicable thereto."[11] Ordinarily, the bail would only be bound by the conditions of the bond, but where they contract in reference to the law, the law becomes a part of the contract, and they are bound thereby, and the whole statute must be examined to determine the extent of their liability.[12]

"The defendant [in a civil case] may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant will at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action."[13]

"The defendant, at any time before execution, must be discharged from arrest, either upon giving bail or upon

8. Code Civ. Proc., § 1213. See CONTEMPT.
9. Code Civ. Proc., § 1215.
10. Code Civ. Proc., § 1216.
11. Civ. Code, § 2781.
12. Matoon v. Eder, 6 Cal. 57.
13. Code Civ. Proc., § 487.

depositing the amount mentioned in the order of arrest."[14-15]

Proceedings to reduce amount of bail.—The code provides as follows:

"A defendant arrested [in a civil action] may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to . . . reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made."[16]

And further:

"If, upon such application, . . . it appears that the bail was fixed too high, the amount must be reduced."[17]

§ 39. Deposit of Money or Property in Lieu of Bail.—As to the right to deposit money instead of bail in a civil proceeding, the code enacts that

"The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, . . . the defendant may deposit such amount instead of giving bail. In either case the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody."[18]

"The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited, as in other cases of delinquency."[19]

14-15. Code Civ. Proc., § 486. See Code Civ. Proc., § 492 (providing for the filing of the undertaking with the clerk).

16. Code Civ. Proc., § 503.

17. Code Civ. Proc., § 504.

18. Code Civ. Proc., § 497.

19. Code Civ. Proc., § 498. See infra, § 42, as to liability of sheriff as bail generally.

"If money is [so] deposited, . . . bail may be given and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant."[20]

Disposition of deposit on recovery of judgment.—If money has been deposited instead of bail in a civil case, and it

"Remains on deposit at the time of recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court, refund to him the whole sum deposited and remaining unapplied."[1]

§ 40. Qualification and Justification of Bail.—The qualifications of bail in civil actions are as follows:

(1) "Each of them must be resident householders or freeholders within the state. And (2) Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, . . . over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or county clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail."[2]

"For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination must be reduced to writing, and subscribed by the bail, if required by the plaintiff."[3]

20. Code Civ. Proc., § 499.
1. Code Civ. Proc., § 500.
2. Code Civ. Proc., § 494.
3. Code Civ. Proc., § 495.

And "if the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability."[4]

§ 41. Exoneration of Bail Generally.—Under the code, the bail may surrender the defendant in their exoneration "at any time before judgment, or within ten days thereafter."[5]

And the code further provides that,

"For the purpose of surrendering the defendant, the bail, at any time or place before they are finally discharged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter."[6]

"If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment."[7]

Also, "The bail are exonerated by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process."[8]

Where, in a civil action, there was no surrender of defendant nor execution issued within ten days after judgment, but after the expiration of the ten days an execution was issued against the body of the defendant and placed in the hands of the sheriff, and on the same day

4. Code Civ. Proc., § 496 (in part). See infra, § 42, as to liability of the sheriff as bail.

5. See Code Civ. Proc., § 488.

6. Code Civ. Proc., § 489. See supra, §§ 29, 30.

7. Code Civ. Proc., § 490.

8. Code Civ. Proc., § 491.

defendant called on the sheriff and offered to surrender himself in discharge of his sureties, but the sheriff, acting under plaintiff's instructions, refused to take him into custody, and afterward the sureties on the bond went with defendant to the sheriff for the purpose of giving him into custody, but the sheriff again refused to receive him, it was held that the sureties were exonerated; as the legislature, in providing for the surrender of defendant within ten days after judgment evidently contemplated that the plaintiff should take such measures as would authorize the officer to hold defendant in custody, and the offer to surrender within ten days after issuance of the execution is sufficient compliance with the statute.[9]

§ 42. Liability and Exoneration of Sheriff as Bail.— The sheriff must retain the original undertaking in his possession until it is filed; and "plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court."[10]

"Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff or his attorney notice of the justification of the same, or other bail (specifying the place of residence and occupations of the latter), before a judge of the court or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking."[11]

9. Allen v. Breslauer, 8 Cal. 552; Babb v. Oakley, 5 Cal. 93 (offer of the defendant to surrender himself in discharge of his sureties, held a good surrender and discharged sureties from all liability). See People v. McReynolds, 102 Cal. 308, 312, 36 Pac. 590, holding that when a party has been taken into the sheriff's custody, the sureties on his bail are released.

10. Code Civ. Proc., § 492.

11. Code Civ. Proc., § 493.

And it is further enacted that,

"If a judgment is recovered against the sheriff upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency."[12]

In the Political Code provision is made concerning the liability of a sheriff suffering the escape of a person arrested in a civil action,[13] and the Code of Civil Procedure provides that

"If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving [of] bail at any time before judgment."[14]

§ 43. Reimbursement of Bail.—The rule has been stated generally that without an express contract of indemnity a surety on a criminal recognizance cannot maintain an action against the principal to recover any sums he may have been obliged to pay by reason of the forfeiture of the principal, because there is no implied promise on the part of the principal in a bail bond in a criminal case to indemnify his surety. Such a contract is against public policy in that it gives the security of one person only instead of two. But there is a distinction between bail in civil and bail in criminal cases which materially affects the legal rights of the surety to recover against his principal for loss sustained by reason of a forfeiture of his bail bond. And it has been said that no consideration of public policy could interfere with the right of the principal arrested in a civil case to agree to indemnify his bail against loss by reason of an obligation entered into, for the purpose of bail in such a case is merely to secure payment of the judgment to the plaintiff, and bail

12. Code Civ. Proc., § 502.
13. Pol. Code, §§ 4163, 4164.
14. Code Civ. Proc., § 501.

in civil cases as sureties possess the rights and remedies of sureties in other cases.[15]

The question as to whether section 2779 of the California Civil Code, providing for the indemnifying of sureties generally, is applicable to a matter of reimbursement of bail, has not, as yet, been determined by the courts of last resort. In this connection it has been held that bail are not, however, on the same basis as an original surety for the payment of the debt, and therefore, although their obligation is of a later date than the original surety, they cannot be compelled to pay the amount of the judgment to the surety who has satisfied it, unless at the time of the assignment of the judgment to the surety the obligation of the bail to pay was absolutely fixed, for, until such time, the obligation to pay is contingent upon their failure to produce the person of the defendant.[16]

15. 3 Ruling Case Law, pp. 60, 61. See supra, § 2, as to the distinctions generally. See SURETYSHIP.

16. 3 Ruling Case Law, p. 61.

(D. W. C.)

INDEX.

[The numbers in this Index refer to pages]

APPEARANCE—
Alien heir, 3
Appeal, notice of, 16
voluntary appearance, 6
Appellate court, 6
Attorney, appearance by, 3, 4
authority, 4, 15
control of case, 3
general appearance, see General Appearance
persons affected, 4
several defendants, mistake, 4
unauthorized appearance, 4
Characterization, 12
Collateral attack on judgment, 4
Control of case, 3
Definition, 2
Dismissal for want of, 6, 7
Distinctions, 2
Distribution, decree of, 4
Duty to appear, 3
General appearance, 8
acknowledgment of service, 12
after special appearance, 20
answer or demurrer, 9
answers, 10, 11
attorney's authority, 15
characterization as special, 12
"coming into court," 11
concealing defendant, 15
consent to decree, 12
continuance, motion for, 9
notice of, 11
cross-complaint, 17
defined, 2
demurrers, 9, 10, 13
deposition, participating in, 17
effect, 14
acquisition of jurisdiction, 14
waiver of defect of process, 15
waiver of irregularities, 17
executor, 14
jurisdiction, acquisition of, 14
right to stand on objection, 20
McEnerney Act, suit under, 17
modes of making, 8

APPEARANCE—Continued.
General appearance, motion to dismiss, 10, 13
motion to strike out, 8
motion to vacate judgment, 13
named in complaint, 14
notices, 9
notices of appearance, 11
in writing, 12
waiver of, 17
open court, notice in, 12
oral authority, 12
oral requests, 10
order to show cause, answer to, 11
paper incidentally served, 9
person not named in complaint, 14
pleading, irregularities waived, 17
probate proceedings, 15, 17
quieting title, 17
relief, asking for, 8
renewed appearance, 15
request for time to plead, 9
retainer, notice of, 12
special appearance after, 19
stipulations, making of, 8
stipulation for entry of judgment, 10
stipulation for stay, 10
submission to jurisdiction, 8
time to plead, extension of, 9, 11
trustee, 14
what constitutes, 8
withdrawal of, 19, 20
Guardian and ward, 5
Infants, 5
In propria persona, 3
Irregularities waived, 17
Jurisdiction, see Special Appearance
Kinds, 2
Minors, 5
heirs, 5, 15
Nonresident, 2, 3
Notice, signature of attorney, 11

[The numbers in this Index refer to pages]

APPEARANCE—Continued.
Party, appearance by, 2
Personal appearance, 3
right to acquire, 3
Persons affected, 4
Probate proceedings, 5, 15
voluntary appearance, 16
Process, service after unreasonable delay, 20
voluntary appearance, 16
waiver of, 15
Recital of, 4
Relief, asking, character of, 13
Right to appear, 2
Service, see Process
Special appearance, 18
after general appearance, 19
appeal, motion to dismiss, 18
characterizing appearance as, 12
defined, 2
dilatory plea, 18
general appearance after, 20
judgment, motion to vacate, 18
jurisdiction, want of, 18
motion to dismiss, 20
want of prosecution, 19
motion to strike out, 19
quashal of summons, 18
subsequent answer to merits, 20
time to plead or move, extension of, 19
venue, change of, 20
waiver of by answering, 20
Succession, claim of property, 3
Summons, see Process
Time for, 6
dismissal of action, 6, 7
Voluntary, waiver of process, 15
Waiver, defect of process, 15
general appearance after special appearance, 20
irregularities generally, 17
Withdrawal, 19, 20

APPOINTMENT, POWER OF—
See cross-reference, 21

APPORTIONMENT ACTS—
See cross-reference, 21

APPRENTICESHIP—
Age of minor, 23
Common law, 22
Contracts authorized, 22
form of contract, 23
Court, binding by, 23
Criminal liability, 25
Death of master, 26
Definition, 22
Discharge from contract, 25

APPRENTICESHIP—Continued.
Disuse of, 22
Duties of various persons, 24
Enticing away, 25
Executors, binding by, 23
Guardian, capacity to bind, 23
Illegitimate child, 23
Liability of parties, 25
Parent, capacity of, 23
Parties, 23
Removal out of state, 25

APPURTENANCE—
See cross-reference, 26

ARBITRATION AND AWARD—
Action on award, 84
Action, pendency, effect on submission, 48
right to bring suit, 49
Agreed statement, arbitration distinguished, 29
Appeals, see Award
Appraisals, see Award
determining factors, 32
distinctions, 61
nature of investigation, 32
questions of price and value, 31
timber, valuation of, 33
value, question of, 31, 32
Arbitrators, 59. See Proceedings
award of, see Award
compensation, 64
conduct, 62
improper conduct, 61
induction, 59
judge pro tempore, 60
misconduct, 64
misconduct, see Award
naming in submission, 46
number in submission, 46, 47
oath, 59
persons who may be, 59
proceedings, 60–64
qualifications, 59
umpire, 61
Architects' certificates, 53, 54
Award, 65
acceptance of benefits, 90
action on, 84
accounts, 70
partnership accounts, 76
all matters, 72, 73
amendment, 78, 79
amount to be paid, 71
appeals, 91
bill of exceptions, 93
conflicting evidence, 93
entry of submission, 94
judgment entered, 91

[The numbers in this Index refer to pages]

ARBITRATION AND AWARD—Continued.
Award,
appeals,
judgment on appeal, 92
jurisdiction, 91
matters reviewable, 93
procedure, 92
subject matter, 92
vacation of judgment, 93
appraisals, conclusiveness of, 68
architects and engineers, 69
balance due, 71
binding effect, 68
bridge construction, 72
certainty, 70
clerk's entry, 83
collateral attack, 67
compulsion by court, 66
conclusiveness, 67
appraisals, 68
construction, 66
construction contracts, 71
contrary to law, 87
corruption, 79
costs, 81
delivery, 65
differences, 70
effect, 67
enforcement, 84
as judgment, 82
entry as judgment, 82
by clerk, 83
equitable principles, 66, 77, 87
errors, character of, 80
modifying and vacating award, 86
prejudicial error, 88
waiver of, 90
evidence, failure to hear, 80, 81
exceeding authority, 75
exchange of land, 75
finality, 70
fraud, 79
impeachment, 77
further inquiry necessary, 71
good in part, 88
impeachment, 77
errors, nature of, 80
fraud, 79
misconduct, 80
inadequacy, 72
insurance, loss, 80, 85
invalid awards, 71
issues limited, 75
ita quod clause, 73
judgment, analogous to, 29
final judgment, 67
judgment entered, 82
language, 65
law and facts, 77

ARBITRATION AND AWARD—Continued.
Award, law, award contrary to, 87
principles of, 66, 77, 78
legal rights, 78
matters determined, 72
miscalculation, 79
misconduct, 80
mistake, 77
correction of, 78
modification by court, 78
motion to modify, 89
modifying award, 86
notice, 84
omissions, 74
parol, 65
part good and part bad, 88
partial determination, 72–74
partition of realty, 84
partnership differences, 70–72, 76
penalty, 84
pleading, 84
allegation, 85
defenses, 86
variance, 86
postponement, refusal of, 80
power exceeded, 75
price to be fixed, 69
rehearing, 88
releases, execution of, 84
resale of land, 75
review of proceedings, 87
revisory power of courts, 69
separation of parts, 79, 89
setting aside, 77
signature, 65
waiver of, 91
specific performance, 84
stay of proceedings, 89
striking out parts, 90
submission, award as coextensive with, 73
supplementary award, 79
time for making, 66
extension, 66
time as essence, 67
undated award, 66
ultra vires, 75
vacating award, 86
valuations, 68–70, 74
waiver of defects, 90
writing, 65
Building contracts, 53, 54
California law, survey of, 34
Character of proceeding, how fixed, 30
styling persons, "arbitrators," 33
Clerk, entry by, 83
Common law, arbitrations distinguished, 36

[The numbers in this Index refer to pages]

ARBITRATION AND AWARD—Continued.
Common law, controversy, absence of, 38
matters not arbitrable under statute, 37
remedy, statutory provisions, 35
statutory proceedings failing, 37
submissions under, 36
Common law, proceedings, effect as, 37
Compensation of arbitrators, 64
Condition precedent to suit, see Submission
Construction contracts, 53
Controversies, 43
absence of, 38
existence of, 30
Costs, award of, 81
Cotenants, agreement between, 30
Definitions, 28
Disputed matters, 43
Distinctions, 28
Entry, see Award
Errors, see Award
Evidence, see Proceedings
Exchange, differences between members and nonmembers, 31
Existence of controversy, 30
Extension of suit, submission as, 29
Frauds, see Award
Hearing, see Proceedings
contract for arbitrators' own judgment, 33
Impeachment, see Award
Industrial arbitration, 34
Insurance policies, liability under, see Submission
Judgment, entry of award, see Award
Jurisdiction of court, 40
pending action, 48
requirements of statute, 35
suit in court, 49–55
Labor disputes, 34
Misconduct, see Award
Mistakes, see Award
Modification, see Award
Mutual benefit association, claim against, 33
Nature of statutory proceedings, 35
Notice, see Proceedings
Parties, 38
Partition agreements, 30
Partners, awards in partnership disputes, see Award

ARBITRATION AND AWARD—Continued.
Pleadings, 29
action on award, 84
Policy of law, 35
Price, questions of, 31
Proceedings, see Arbitrators
appraisements distinguished, 61
before arbitrators, 60–64
evidence, 64
admissions, 64
reception of, 63
ex parte, 60
ground for vacating, 64
majority to act, 60, 61
notice of hearing, 60, 62
selection of umpire, 61
witness swearing, 63
Real estate, value of, 31
Reference, arbitration distinguished, 29
Revocation, 55
Scope of article, 28, 30
Statutes, common law, arbitrations distinguished, 36
compliance with, 35
jurisdiction of proceedings, 40
policy of the law, 35
review of, 34
strict construction, 35
Statutory, see Common Law
Stay of proceedings, see Award
Stock exchange differences, 31
Suit, condition precedent to, 49
Subjects, 43
Submission, abiding by award, agreement for, 45
action, condition precedent to, 49
discontinuance of, 48
agreement, nature of, 29
amendment of clerk's entry, 42
appeal, denial of right, 45
arbitrators, naming of, 46
selection of, 46, 47
number of, 47
architect's certificate, 53, 54
award as coextensive with, 73
clerical misprision, 43
clerk, duties of, 42
conditions giving jurisdiction, 40
condition precedent to suit, 49
architect's certificate, 53, 54
building contracts, 54
construction contracts, 53, 54
insurance policy, 52
insurer's liability, 54
necessity that stipulation be valid and pertinent, 52

[The numbers in this Index refer to pages]

ARBITRATION AND AWARD—Continued.
Submission
condition precedent to suit, sureties' liability, 53
waiver of, 54
construction contracts, 53, 54
contents, 45
contractor, sureties for, 53
court, wrong, 41
departure from statute, 45, 46
disputed matters, 43
effect, 56
nature of claim, 56
waiver of formalities, 57
enforcement of agreement, 56
"entered as an order," 31
entry by clerk, 42
finality, stipulation for, 45
form, 45
formalities, waiver of, 57
insurance policies, liability under, 52, 54, 55, 57
jurisdiction of proceedings, 40
clerk's entry, 42
ousting court, 51
ruling of court, 41
taking away, 49
liberal construction, 45
limitation of actions, 58
meaning of term, 29
mining claim, 44
municipal corporation, termination of wharf franchises, 58
parties, 38
agents, 38
minors, 38
municipal corporations, 39
partners, 39
power of attorney, 38
partition of land, 43
pending suit, 41, 48
persons capable of contracting, 38
proceedings in rem, 44
real property, matters concerning, 43, 44
revocation, damages, 55, 56
statute of limitations, 58
stipulations, 41
subjects, 43
substitute for court proceedings, 29
sureties' liability, 53
title to real property, 44
valuation of property, 32
void or invalid submissions, 45
wharf, possession of, 58
will, validity of, 44, 46
writing, 45

ARBITRATION AND AWARD—Continued.
Substitute for court proceedings, 29
Sureties, liability, 53, 54
Vacation, see Award
Value, see Appraisal
questions of, 31
Waiver, award, defects in, 90
condition precedent to suit, 54

ARCHITECTS—
Building operations, 96
Certificates, 106
architect's charge, 107
conclusiveness, 109
condition precedent, 107
dispensing with, 109
effectiveness, 110
evidence in collateral matters, 110
excuse for not obtaining, pleading, 109
findings, 109
fraud, mistake, 109
good faith, 110
impeachment, 109
incorrectness, 110
mechanic's lien, 111
payments without, 108
professional architects, 107
refusal to issue, 108
waiver of, 107
withholding, 108
Compensation, 102
acceptance of plan, 103
with reservations, 105
allegations and proof, 104
amount, 102
commission on cost, 103
completed work, 103
corporation, 104
counterclaim for damages, 104
discontinuing work, 103
estimates, 103
evidence, 105, 106
interest, 105
negligent performance, 104
plan dependent on contingency, 103
right to, 102
value of service, 105, 106
Contracts between owner and architect, 101
validity of, 99
Corporation practicing, 98
Costs, misrepresented, 102
Damages for deceit, 102
Definition, 96
Duties, 101
Examination, 97

[The numbers in this Index refer to pages]

ARCHITECTS—Continued.
Fraud, 102
Liabilities, 101
Licenses, 97
fee for license, 98
Miscalculations, 101
Negligence, 100
Nonresidence, 97
Plans, sale of, 98
Practice of profession, 97
Qualification, 97
Regulation of profession, 96
constitutionality, 99, 100
individuals of corporation, 98
object of statute, 98
Scope of article, 95
Secrecy, 101
Skill required, 101
State board, 97
Status, 96
Statutory provisions, 96
Stipulation for, 106
Superintendent of construction, 101

ARGUMENT OF COUNSEL—
See cross-reference, 111

ARMS—
See cross-reference, 111

ARMY—
See cross-reference, 111

ARRAIGNMENT—
See cross-reference, 111

ARREST—
Admittance to house, 131
Armed offender, 130
Authority without warrant, 115
Bail, arrest by, 119
Breaking doors and windows, 130
Causing arrest, liability for, 157
Civil actions, affidavit, 143
averment of, 144, 145
averments of specific grounds, 146
complaint attached to, 144
general allegations, 146
information and belief, 147
justices' courts, 148
sufficiency, 144
agent, money received by, 141
alimony, 141
authority, 142
cases in which authorized, 142
cause of action arising in foreign country, 143
constitutional provision, 140

ARREST—Continued.
Civil actions, creditors defaulting, 147
"debt," what constitutes, 141
departure from state, 146
discharge, 154
embezzlement, 142, 146
execution against person, 152
discharge, 154
executor and administrator, 142
money in hands of, 141
final process, 142, 152
discharge, 154
execution against person, 152
second arrest, 154
forcible entry and detainer, 142
fraud, 142
averment as to, 144
execution against person, 153
proof of, 153
setting forth, 143, 144
fraudulent action, existence of, 144
habeas corpus, discharge on, 150
imprisonment for debt, 140
jurisdiction to order, 143
liability for causing arrest, 157
mandamus, enforcement of, 142
mesne process, 140, 142
order, 143
execution of, 151
issuance of, 149
issuance by justice of peace, 144
validity of, 149
partner surviving, 142
pretended sale, 147
quo warranto, enforcement of, 142
receiver, money due, 141
remedy, nature of, 142
removal of property, 147
sheriff, duty of, 151
transfer, judgment declaring void, 141
vacation of, 151
wages, money due as, 141
will, person refusing to produce, 142
Complainant, liability of, 158
Custody of prisoner, 138
county in which arrest made, 139
Deadly weapon, use of, 130
Definition, 113
Discretion of officer, 119
Disposition of prisoner, 138
Duty to make, 116
Entry into house, 131
Escape, 128

[The numbers in this Index refer to pages]

ARREST—Continued.
Evidence in cases of homicide, 133
Exemptions, 114
electors, 115
legislature, members of, 114
witnesses, 115
Facts, 121
False imprisonment, 117
Felony, private person, arrest by, 114
suspicion of, 116
without warrant, 116
Fleeing person, 120
justifiable homicide, 131
Force, liability of officer, 157
use of, 130
Homicide in making, 131
conspiracy to resist, 137
evidence in cases of, 133
misdemeanor, arrest for, 132
officer killed by person resisting, 136
resisting arrest, 136
Idle person, 117
Immediate pursuit, 129
Killing, see Homicide
Liability, 155
making and cause, 155
responsibility for causing arrest, 157
wrongful arrest, 155
Making arrest, 128
Magistrate, see Warrant
offense in presence of, 117
taking offender before, 139
Misdemeanor, 117
continuation of, 118
homicide in making arrest, 132
occasion passed, 118
Mistake as to person, 127
Money and property on person, 139
Neglect of duty, 118
Night-time, 116, 128
Notification of official character, 129
Officer, discretion of, 119
liability of, 155
making arrest, 128
presence of officer, offense committed in, 118
without warrant, 115
Official character, making known, 128
Posse comitatus, 116
Presumption of legality, 118
Private person, arrest by, 119
custody and disposition of prisoner, 138, 140
Privileges, 114
Probable cause, 120
Railroad employees, arrest by, 119
Resistance, 134
action for resisting, 135
conspiracy, 137
homicide in resisting, 136
lawful arrest, 134
pleading and evidence, 135
third person, 135
unlawful arrest, 134
use of weapons, 134
Scope of article, 113
Summoning aid, 116
Suspected persons, 120
question of law or facts, 121
reasonable or probable cause, 120
Suspicion of felony, 116
Suspicion of misdemeanor, 117
Time of, 128
Vagrant or beggar, 119
Warrant, affidavits, 124
arrest under, 120
arrest without, 115
complaint, 123
county in which served, 125
defects, 122
depositions, 123
execution of, 125
form, 121
information, 123
issuance, 123
issued by whom, 121
magistrate to issue, 123
offense triable in another county, 122
officer to execute, 125
duty to execute, 126
person named, 127
protection to officer, 126
showing, 130
taking offender before magistrate, 122
telegraph, service by, 126
validity, 121
Wrong person, 127
Wrongful arrest, liability for, 155

ARREST OF JUDGMENT—
See cross-reference, 159

ARSON—
Appeal, review, 177
Attempts, 170
Building, character of, 162
human being in, 165
occupancy, 164
owner burning his own, 165

[The numbers in this Index refer to pages]

ARSON—Continued.
Building, ownership, 162, 164
rightful occupancy, 162
tenant burning, 165
Burden of proof, 174
Burning, 162, 170
evidence as to, 170
indictment charging, 167
license to burn, 165
what constitutes, 163
Cellar, setting fire to, 164
Corpus delicti, 175
Definition, 161
Degrees, 161
Dwelling, offense against, 162
Elements of crime, 161, 162
Evidence, 170
admissions, 172
burden of proof, 174
burning other building, 171
circumstantial, 170, 171, 173
confessions, 172
corpus delicti, 172, 175
experiments, 171
incendiary origin, 171
intent and motive, 173
photographs, 171
reasonable doubt, 174
Fraud against insurance company, 161
Habitation, 163
Indictment and information, 166
allegations, 166
building in possession of tenant, 169
burning, 167
intent to destroy, 167
order dismissing, new information, 177
ownership, averment of, 168
possession, averment of, 168
setting fire, averment of, 168
venue, 167
Inhabited building, 162
Insurance company, defrauding, 161
Intent, 162
evidence of, 173
Jury, view by, 176
Landlord and tenant, 165, 169
Malice, 162
Motive, 161
evidence of, 173
Night-time, meaning of, 162
Other offenses, 170
Punishment, 177
Reasonable doubt, 175
Scope of article, 161
Trial, 174
jeopardy, 177
ARSON—Continued.
Venue, 167
Verdict, 177
View of place, 176
Yard, burning of, 163

ASSAULT AND BATTERY—
Civil action, 182
damages, 190
agent or servant, acts of, 193
compensatory, 190
criminal prosecution, effect of, 193
earning capacity, 190
excessive and inadequate, 191
exemplary, 192
amount of, 193
mitigation of, 195
expectation of life, 191
malice, oppression and fraud, 192
medical expense, 190
mitigation of, 194
proximate results, 191
suit by representative, 191
verdict, form of, 194
death of person, 182
defenses, 187
ejection of trespasser, 188
intoxication, 187
protection of property, 188
provocative acts, 187
recovering property, 188
self-defense, 187
evidence, 184
acts and declarations, 185
character, 185
criminal case, plea and judgment in, 185
damages, mitigation of, 194
judicial notice, 186
language used, 184
malice, 184
forcible entry, 183
joint assault, verdict for, 186
jury, questions for, 186
limitation of action, 183
personal representative, time for bringing action, 184
pleading, 186
property, protection of, 188
real property, ejection of trespasser, 188
trespass on, 183
res gestae, 184
right of action, 182
self-defense, 187
statute of limitations, 183

[The numbers in this Index refer to pages]

ASSAULT AND BATTERY—Continued.
Civil action, survivor, 182
trespassers, action by, 183
ejection of, 188
necessity for warning, 189
protection of property, 189
street-car passenger, 190
who are, 189
trial, 186
verdict, 186
Criminal action, 196
ability, 199
accessory, 201
acids, throwing, 207
acquittal, effect of, 229
aggravated assaults, 197, 202
attempts, 198
evidence, 199
pointing gun, 198
thwarted attempts, 198
bodily injury, 202
chemicals, assault with or by aid of, 207
evidence, 208
conviction of battery on trial for assault, 229
convicts, assaults by, 204
constitutionality of statutes, 204
elements of assault by, 205
indictment, 222
instruction to jury, 224
verdict, 227
crime against nature, 202
deadly weapon, 196, 197, 202
attempt to strike, 203
evidence, 212
existence of, 206
injury, 203
intent, 203
life prisoner, assault by, 204
malice, 203
throwing out of window, 203
weapons not deadly, 207
what constitutes, 205
review on appeal, 207
defenses, 208
force to protect one's self, 209
insanity, 211
burden of proof, 212
intoxication, 211
officer, ejection of, 210
repelling assault, 209
self-defense, 208
threats, 210
trespasser defending himself, 209
ejection of, 210

ASSAULT AND BATTERY—Continued.
Criminal action, degrees, 201
drawing weapon, 197
drugs, administering, 207
elements, 196
evidence, 212
ability, 215
attempts, 199
burden of proof, 214
character of accused, 216
cross-examination, 213
declarations, 212
defendant as witness, impeaching, 217
discharge of pistol, 216
intent, 214
loaded gun, 216
motive, 214
rebuttal of showing, 215
raids and quarrels, 214
res gestae, 212
similar assaults, 217
threats, 214
throwing vitriol, 215
weapon, character of, 212
introduction of, 212
wife, testimony of, 213
felony, 202
fine or imprisonment, 228
force, excessive, 200
grand larceny, intent to commit, 202
gunpowder, 196
indictment and information, 219
ability, 221
aiding and abetting, 222
allegations of, 212
chemicals, assault with, 222
complaint in justices' courts, 222
deadly weapon, 220
kinds of weapons, 219
life prisoner, assault by, 222
misnomer of offense, 222
naming person assaulted and accused, 221
probative facts, 221
statutory language, 219
instructions, 223
intent, 196, 197
order to give security, 229
particular person, 197
jurisdiction, 217
federal customs officer, 218
felony cases, 218
justices' courts, 218
jury, questions for, 223
justices' courts, complaint in, 222

[The numbers in this Index refer to pages]

ASSAULT AND BATTERY—Continued.
Criminal action, kinds of assault, 201
life prisoner, assault by, 204, 205
mayhem, intent to commit, 202
menace, 196
misdemeanors, 201, 202
mistake as to person, 197, 198
murder, intent to commit, 202
particular person, intent to assault, 197
persons liable, 201
pointing gun, 199
pointing pistol, 197
powder, 198
prevention of battery intended, 200
principals, who are, 201
prisoner, assault with deadly weapon by, 204
procedure, 217
property, protection of, 210
punishment, 227
rape, intent to commit, 202
relation between parties, 213
robbery, 202
self-protection, 208, 209
sentence, 228
legality in part, 228
simple assault, 201
striking distance, 200
threat, 197
trespasser, ejection of, 210
verdict, assault by life convict, 227
with deadly weapon, 225, 226
with specific intent, 225
conviction, verdict of, 224
degree of offense, 224
intent to commit murder, 225
specific intent, 226
vitriol, throwing, 207, 208
Definitions, 181
Scope of article, 180

ASSESSMENTS—
See cross-reference, 229

ASSIGNMENT OF ERRORS—
See cross-reference title

ASSIGNMENTS—
Absolute assignment, rights under, 277, 278
Actions, 291
absolute assignment, 295
assignee, suit by, 292
suing in his own name, 295
assignments pendente lite, 297

ASSIGNMENTS—Continued.
Actions, assignor suing assignee, 291
capacity to sue, 293
claim, assignee as security, 294
control of case, 297
evidence, see Evidence
findings, 309
indorsement in blank, 294
intervention, 291
joinder of cause, 294
judgment, 311
notice of assignment, 294
partial, assignee as party, 295
assignee, suit by, 294
assumpsit, 295
parties, 291
partners, 293
pendency of cause, 297
pleading, see Pleading
ratification, assignment, 293
splitting causes, 295
substitution of parties, 297, 299
transfer of interest, pending suit, 297
Agency agreements, 244
Agent, assignment by power of attorney, 266
Amount, assignment of, 267
Appeal, presumptions on, 311
Assault and battery, claims for, 256
Assignability, intention, 239
rules and exceptions, 242
stipulations, concerning, 239
various interests and rights, 236
"Assigned," meaning of, 233
Assignee's liability, 280
Assignor, right of, 294
Bank checks, partial assignments, 276
Bill in equity, right to bring, 257
Bills and notes, transfer of, 238
Burden of proof, 307
Burdens, transfer of, 280
Business, sale of, 242, 243
Certificates of purchase, 252
Choses in action, assignability, 240
interests assignable, 236
realty, choses relating to, 252
right under contracts, 233
torts, see Torts
transfer of, 232, 233
Consent of debtor, 272
partial assignment, 273, 274
promise to pay, 272

[The numbers in this Index refer to pages]

ASSIGNMENTS—Continued.
Consideration, 267
action by assignor for, 292
contingent interests, 249
equitable assignments, 268
gift, 268
necessity of, 267, 268
pleading, 299
Construction, circumstances considered, 282
liberal construction, 299
rules of, 281
several instruments, 283
words and phrases, 282
Contingent interests, 247
Contracts, 237
action for breach, 238
assignability, 241
benefits and burdens, 238
building construction, 245
equities and priorities, 283
executory, 239
status of parties, 292
governmental, 243
liability of assignee, 280
moneys due under, 278
municipal, 243
option agreements, 245, 253
performance by another, 244
personal services, 244, 245
professional services, 244
restraint of trade, 242
skill, credit and personal qualities, 244
specific performance, action for, 238
street improvements, 245
void contracts, 279
wages and salaries, 245
Contractual interests, assignability, 236
Costs, passing of, 280
Damages, claim for, 255
Debt, agreement to pay, 234
not in existence, 250
Defenses, see Equities
Definition, 232
Delivery, conditional delivery, 265
instrument or evidence of indebtedness, 266
necessity of, 264
possession, change of, 265
presumption, 265
written evidence, 265
Description of choses, 267
Distinguished from other transactions 234
Equitable, 259
acceptance of benefits of contract, 260

ASSIGNMENTS—Continued.
Equitable, action by assignee in his own name, 297
agreement to pay debt of another, 236
bank, note payable to cashier, 260
building contract, lien claimants, 261
charge on property, 249
choses not cognizable at law, 259
consent of debtor, 262, 272
consideration, 261, 268
contingent interest, 248, 249
debt not in existence, 250
direction to pay debt, 260
expectancies of heirs, 250
form and requisites, 261
fund or money due, 259
future-acquired property, 234, 235
implied by operation of law, 260
intention of parties, 261
carrying out, 259, 260
interest on which assignments operate, 262
latent defects, 289
order on fund, 260
order or bill of exchange, 252
partial assignment, 274
specific demand, 262
subrogation, doctrine of, 260
surety, subrogation of, 260
ward, judgment against guardian, 261
writing, necessity of, 262
Equities, 283
available against assignees, 286
estoppel in favor of assignee, 290
non-negotiable instrument, 288
recoupment, 288
third persons, rights of, 289
void claims or demands, 289
Equity, right to sue in, 257
Estate, claims against, 258
Estoppel in favor of assignee, 290
judgment, 311
Evidence, 304
assignment, admissibility, 305
burden of proof, 307
circumstances, 305
corporation assignment, 306
declarations of assignor, 305
delivery of instrument, 304
equitable assignment, 305
execution and delivery, 306
lease, transfer of, 307

[The numbers in this Index refer to pages]

ASSIGNMENTS—Continued.
Evidence, parol evidence rule, 308
parol testimony, 305
performance of terms, 304
pledge of fund, 304
possession, 304
presumptions, 308
proof of assignment, 304
sufficiency of proof, 306
Executed transaction, 234
Executory contract, 239
distinguished from assignment, 234
Existence of thing transferred, 248
Expectancy of heirs, 250
consideration, 249
covenant not to contest will, 251
False imprisonment, claim for, 257
Fees of officers, 247
Findings, 309
Foreign corporation, assignment by, 286
Formal requisites, 262
delivery, 264
description, 267
equitable assignments, 261
notice and consent, 269
writing, see Writing
Fraud, claim for, 256
exception to rule of nonassignability, 258
naked right to complain of, 259
right to bring bill in equity, 257
right to impeach, 258
Future contingent interests, 248
Future-acquired property, agreement to transfer, 234, 235
Future wages, 246
Garnisheeing creditors, rights of, 284
Gift, consideration, 268
unexecuted, 268
Goodwill of business, 242
Grant, assignment as, 265
Heirs, expectancies of, 250
Husband and wife, community property, 257
Implied assignments, 260
Indorsement in blank, 294
Intent of parties, 282
Interest, right to, 280
Interests assignable, 236
Judgment in suits on assignment, 311

ASSIGNMENTS—Continued.
Judicial sale, certificates of purchase, 253
Laches in presenting demand, 290
Land warrants, 252
Lease distinguished, 235
Liability, imposing on assignee, 280
Liens, see Equitable Assignments
inchoate right to create, 280
transfer under assignment, 279
Malicious prosecution, claim for, 257
Marriage contract for, 257
promise of, 242
Money, contract for payment, 236
Mortgage, assignment of note, 279
distinction between mortgage and assignment, 235
rights of assignee, 279
Negotiable instruments, transfer of, 238
Notice, action, notice as prerequisite, 294
agent, notice to, 272
constructive, 271
debtor's protection, 270
duty of debtor, 271
effect of, 269, 270
form and sufficiency, 271
garnisheeing creditors, 270
language, 271
necessity of, 269
placing assignment on file, 270
preservation of priority, 271
protection of assignee, 269
question of fact, 272
Novation distinguished, 235
Official salaries, 247
Operation and effect, 277
Options, sale of land, 253
Oral, see Writing
Orders, draft against consignment, 275
particular fund, orders on whole of, 276
priorities, 285
See Partial Assignments
Parol, see Writing.
Partial, 273
actions by assignee, 294
adjustment of claims, 275
check on bank, 276
consent of debtor, 273, 274
equity, rule in, 274

[The numbers in this Index refer to pages]

ASSIGNMENTS—Continued.
Partial, pleading, 301
validity and effect, 273
Particular fund, existence of, 277
orders on, 276
Parties, see Actions
Partnership, contracts concerning, 242
injury to, 257
Personal credit, 244
Personal injuries, 241, 242
claims for, 256
Pleading, 299
answer, 303
averments as to assignments, 301
counterclaim, 303
defenses, 303
general rules, 299
means or manner of assignment, 302
setoff, 304
specific performance, 300
supplemental and amended complaints, 300
Possession, see Delivery
reduction of right to, 233
retention by assignor, 265
successive assignees, 284
transfer of, 265
Possibilities, 247
Power of attorney, assignment by, 266
revocation, 267
Priorities, 283
attachment, 285
bank checks, 285
garnisheeing creditor and assignee, 284
notice of assignment, 284
notice to debtor, 269
successive assignees, 283
Proceeds, right to, 278
Property assignable, 236
Public lands, certificates of purchase, 252
Public officers, claims of, 257
salaries and fees, 247
Public works, contracts for, 243
moneys due under, 244
Ratification, 293
Real property, certificates of purchase, 252, 253
choses relating to, 252
claim for damages, 255
land warrants, 252
options, 253
servitudes, 254
Recoupment by debtor, 288
Remedies, transferred, 279

ASSIGNMENTS—Continued.
Restraint of trade, contracts in, 242
Rights, see Actions; Equities
acquired by assignee, 278
arising out of obligation, 237
assignable rights, 236
assignee's rights, 277, 292
assignor's rights, 291
costs, 280
incidental rights, 279
interests, 280
liability of assignee, 280
setoff, 287
void assignment, 278
Salaries, 245, 247
Scope of article, 233
Securities, action by assignee, 294
transfer, 279
Servitudes, 254
Setoff and defense, 287
distinguished from recoupment, 288
Several assignments, priorities, 283
Slander, claims for, 256
Specific performance, 258
pleading, 300
Splitting claims, 273
Stipulations for or against, 239
effect of, 240
Subletting distinguished, 235
Successive assignees, priorities, 283
Sureties, right of action by assignee, 278
Survivorship of action, 241
Testamentary disposition, 236
"Thing in action," 233
see Choses in action
Torts, actions arising out of, 241
choses in action for, 254
husband and wife, 257
partnership, injury to, 257
personal injuries, claims for, 256
right to bring bill in equity, 257
Trade, restraint of, 242, 243
Transfer, assignment as, 233
choses in action, 232, 233
synonymous with assignment, 232
Validity, 262
Verbal, see Writing
Verdict, unassignability, 280
Void assignment, interest transferred, 278

[The numbers in this Index refer to pages]

ASSIGNMENTS—Continued.
Wages, 245
assignor married or minor, 246
Will, covenant not to contest, 251
distinguished from assignment, 236
Writing, judgment, provisions of, 311
name of assignee, parol authority to fill in, 264
necessity of, 262
oral assignments, validity, 263
parol assignments, validity, 262
parol evidence rule, 308
real property, interest in, 264
salary or wages, 264
verbal gift, 263, 264

ASSIGNMENTS FOR BENEFIT OF CREDITORS—
Acknowledging, 321
Assignee, actions by, 324
compensation, 327
duties, 325
expense, 327
intervention of, 324
liabilities, 325
powers, 323
protection of property, 325
Bankruptcy Act, effect of, 312
Bond required, 319
California law, outline of, 314
Characteristics, 313
Consideration of transfer, 314
Corporations, assignments by, 316
foreign, 317
Creditors, actions by, 326
estoppel of, 331
holders of negotiable instruments, 329
rights of, in general, 328
right to attack assignment, 330
Delivery, 319
Distinctions, 313
Effect on title to property, 317
prior equitable liens or rights, 318
Foreign assignor, property of, 318
Form, 319
Hindering, delaying or defrauding creditors, 320
Insolvency law, discharge under, 315
Insolvent debtor, who is, 316
Inventory required, 319
mistakes, 321
necessity for, 320
Liabilities provided for, 319

ASSIGNMENTS FOR BENEFIT OF CREDITORS—Continued.
Modification, 320
Objects of law, 316
Omission of debts, 320
Operation of assignment, 317
Operation of law, 315
Partnership, assignments by, 316
Paying off creditor, 315
Persons who may assign, 315
Preference, 322
Property passed, 317
Recording, 321
Requisites and validity, 319
Reservation of interest, 313
Right to assign, 315
Schedule of property, 321
Scope of article, 312
Security, transfer by way of distinguished, 314
Statutes, review of, 314
Surplus, provisions for, 313
Title to property, effect on, 317
Transfer of property, 313
direct to creditor, 315
Trust, presence of, 313
"Void," meaning of, 320
Who may assign, 315
Writing required, 319

ASSISTANCE, WRIT OF—
Adverse possession, title by, 335
Affidavit, 339
Agreement, changing rights of parties, 335
Alias writ, 333, 342
Appeal from judgment, 339, 343
Application of writ, 339
Court to which application made, 340
judgment of another, 334
Definition, 332
Demand of possession, 339
Distinctions, 333
Divorce action, 334, 337
Effect of writ, 336
Equity, court of, 332
Evidence, 339
Execution distinguished, 333
Execution of writ, 343
Foreclosures, see Mortgages
Homestead right, 335
Independent title, 338
persons holding under, 335
Issuance of writ, 342
Judgment for money, 335
Jurisdiction to issue, 334
necessity of, 338
Limitation on issuance, 334
Master's sale, purchaser at, 337

[The numbers in this Index refer to pages]

ASSISTANCE, WRIT OF—Continued.
Mortgages, grantee of mortgagor, 338
mortgaged premises, 341
persons entitled to writ, 337
sale under, 335
Notice, 340
Order of proceedings, 340
Parties, 336
bound by decree, 342
Party not appearing, 334
Persons entitled, 336
against whom writ allowed, 337
Possession, right to, 342
Possessory right distinguished, 333
Proceedings, 339
Purpose, 333
Questions involved, 341
Receiver, appointment of, 336
Relation back, 334
Rights, adjudication of, 341
Rights protected, 335
Service of writ, 343
Setting aside, 342
Sheriff, duty of, 343
Sheriff's grantee, purchaser from, 337
Summary proceedings, 332
Tenants in common, 339
Titles, adjudication of, 336
questions of, 341
Use of writ, 333

ASSOCIATIONS—
Co-operative associations, 368
by-laws, 369
dissolution, 370
formation, organization and purpose, 369
membership, liability, 370
powers, 369
Distinctions, 346
Incorporated, 363
agricultural, viticultural and horticultural, 364
boards of trade, 365
business, engaging in, 368
chamber of commerce, 365
clubs as corporations, 367
definition, 367
membership, 367
property, 367
co-operative associations, see that title
co-operative business corporations, 363
mechanics' institutes, 365
powers, 365

ASSOCIATIONS—Continued.
Incorporated, societies for prevention of cruelties, 367
unincorporated associations, incorporation of, 362
Scope of article, 347
Terminology, 346
Unincorporated, 348
actions by and against association, 348, 356, 357
common name, suit in, 358
foreign association, 360
injunctions, 361
judgment, effect of, 360
parties, 358
principals, 359
process, 359
service of summons, 359
suit by representation, 358
suit in common name, 357
articles of association, 349
by-laws, 349
amendment or repeal, 353
constitution, 349
courts, intervention of, 354
dissolution, 361
incorporation, 362
jurisdiction of courts, 354
intervention on behalf of an association, 356
meetings, 350
membership, 350
expulsion of members, 351
expulsion, intervention of courts, 355
incorporation of association, 362
intervention of courts, 354
judgment against, 360
liability of members, 351
parties to actions, 358
penalties, 354
protection of rights, 351
rights under by-laws, 353
nature of, 348
officers, authority and liability, 353, 354
partnerships distinguished, 348
property rights, 348
restoration, mandamus, 352
rules, enforcement of, 349
status and rights, 348

ASSUMPSIT—
Alternative common counts, 394
Answer, 391, 392
Bill of particulars, 390
Classes, 373
Code practice, use of common counts, 375

[The numbers in this Index refer to pages]

ASSUMPSIT—Continued.
Common counts, joinder of, 393
joinder in one count, 395
use of, 375
Consideration, averment of, 388, 389
Contract, cause of action arising out of, 382
deviation from, 384
by consent, 385
executory, 383
express or implied, 376
fully executed, 384
joinder of causes, 393
money, payment of, 384
necessity of, 376
obligation other than to pay money, 377
part performance, 385
performance, prevention by defendant, 386
repudiated contract, 384
special contract as evidence under common counts, 392
necessity of declaring on, 382
waiver of tort, 377
Conversion, damages where tort is waived, 379
waiver of tort, 377
Corporations as parties, 381
assumpsit by and against, 381
Damages, where tort is waived, 379
Dates and items, setting forth, 390
Definition, 373
Demand or request, pleading, 389
Demurrer, 387
answer or counterclaim, 387, 388
general demurrer to common count, 387
special demurrer to common count, 387
uncertainty, 388
Election of remedy, waiver of tort, 377–379
Employee's salary, 383
Evidence, special contract under common count, 392
Joinder of causes, 393
common counts joined in one count, 395
Limitation, statute of, 390
Municipal corporations, 381
Payment, proof of, 391
Persons affected, 376
Pleading, alternative counts, 394
better method, 388
complaint, sufficiency, 387
defenses and denials, 391

ASSUMPSIT—Continued.
Pleading, raising issues, 391, 392
statute of limitations, 390
use of common counts, 375
Procedure, 387
Reformed procedure, effect of, 375
Scope of article, 373
Setoff and counterclaim, 377
Special and general, 373
Special contract, see Contract
Subject matter of action, 376
Tort, amount recoverable where tort is waived, 379
waiver of, 377
limitation of rule as to, 379
Use in California, 374
Waiver of tort, 377

ASYLUMS—
See cross-reference title

ATTACHMENT—
Abandonment, 486
Abuse of process, see Wrongful Attachment
Actions in which remedy available, 413
character of, 464
commencement, necessity of, 404
contracts, 413
criminal actions, 414
in personam, in rem, 464
joinder of causes, 472
justice's court, suits, 414
obligors in undertaking to release, see Release
proceedings in, 464
subject of, 464
tort, 413
wrongful attachment, see Wrongful Attachment
see Contracts; Jurisdiction; Process
Affidavit, 431
alternative statement, 436
amendments, 445
by whom made, 447
dissolution of attachment, 447
execution of affidavit, 447
amount of indebtedness, 438
claim or clause, statement of, 436
code requirements, 431
construction, 436
contents, 432
contract, nature of, 439
corporation, affidavit for, 434
counterclaim, 440
creditor, on behalf of, 433

[The numbers in this Index refer to pages]

ATTACHMENT—Continued.
Affidavit, demand of complaint, conformity with, 441
dissolution for irregularities and defects, 542
execution, 434
evidence, affidavit as, 435
false statement, 443
formal requisites, 434
good faith, recital of, 445
implied and express contract, 439
indebtedness, facts out of which arose, 439
recital of, 438
information and belief, 434
initiation of proceedings, 431
interest, 439
justice's court, affidavit in, 436
knowledge, 434
necessity of, 432
nonresidence, 443
oath, administration of, 434
party to make, 433
pleading, affidavit as, 435
probative facts, statement of, 435
purpose of causing attachment, 436
recitals, 435
residence, recital of, 443
security, recital of, 442
setoff and counterclaim, 440
statutory language, 443
surplusage, 439
writ to conform with, 459
Amendments, see Affidavit; Writ
Amount of indebtedness, 442
Appeal, appellate procedure, 480
bond, enforcement, 479
dissolution, record on appeal, 546
review on appeal, 547, 548
dissolving or refusing to dissolve, 480, 545
effect of, 478
judgment for defendant, effect of, 477
jurisdiction of trial court, 479
justice's court, 480
lien, continuance of, 486
regularity of attachment, 480
reviewable matters, 480
Assignee, rights of, 500
Auxiliary remedy, 405
Bailees, rights of, 498
Bankruptcy or insolvency, effect of, 411
dissolution for, 535
undertaking to release attachment, 526

ATTACHMENT—Continued.
Bond, prevention of attachment, 507
release of attachment, see Release
see Security; Undertaking
Carrier, lien of, 408
Chattel mortgages, see Priorities
Claims, priorities, 490
Collateral attack, 430
Construction of statutes, 404, 407
Continuance, 485
Contracts, amount due under, 424
amount to be paid, definiteness, 416
appeal bond, 416
bail bond, 416
collateral contracts, 415
damages for breach of, 423
debt not due, 424
deceit, action for, 423
equity, suits in, 425
foreign contracts, 417
founded on contracts, 416
fraudulent, 425
guaranty, 416
implied contracts, 422
joinder of causes, 424
license tax, recovery of, 416
made or payable in state, 417
maturity of demand, 424
money, direct payment of, 415
official bond, 416
principal suing agent, 422
remedy in actions upon, 413
security for debt, 418
security valueless, 421
statutory liability, 416
stockholder, suit against, 416
unliquidated sums, 415
vendor's lien, 419
Corporate stock, unregistered transfer, 504
Corporations, attachment by and against, 412
reorganization under new name, 471
Cost, 474
Creditor's bill, attachment upon, 426
Damages, breach of contract, 423
computation of, 423
see Wrongful Attachment
Death of defendant, effect, 536
Deeds, priorities, 492
Defect, proceedings, 429
Defendant's appearance, 469
Definition, 402
Demand, see Release
Discharge, see Dissolution

[The numbers in this Index refer to pages]

ATTACHMENT—Continued.
Dissolution, 533
affidavits on motion, 545
insufficiency of, 542, 543
necessity for, 538
amendment, curing defect by, 542
amount for which writ issued, 543
appeal from order, 545
action against nonresidents, 546
effect of, 538
questions considered on, 546
raising question on, 541
record on, 546, 547
review in appellate court, 546
review of order on appeal from judgment in principal action, 547
code provisions not complied with, 540
complaint, insufficiency of, 541
continuance of rights, 533
death of defendant, 536
defects in proceedings, 542
effected how, 533
evidence dehors papers, 544
grounds in general, 539
improper issuance, 539, 540
irregular issuance, 539, 540
irregularities, 542
insolvency, effect of, 533
judgment for defendant, 477, 533
levy improper, 540
motion for, 533
service of, 539
notice, statement of ground, 540, 541
payment of judgment, 540
previous release, 539
proceedings to dissolve, 538
record to be considered, 544
sureties, failure to justify, 544
trial, agreement to set case for, 539
undertaking, sufficiency of, 544
waiver of right, 539
writ defective, 540
Equitable intervention, 408, 409
Equity, suits in, 425
Estoppel, sureties' liability, 531
Evidence, dissolution, evidence dehors record, 544
rights, priority, 491
Execution, attachment as, 402
injunction against proceedings, 409
satisfaction of judgment, 475

ATTACHMENT—Continued.
Expiration, 485
Grounds, 426
appeal inadequate, 427
contract liability, 427
existence of indebtedness, 426
fraud, 427
nonresidence, 427
meaning of, 428
security, 427
Holding property, 406
Implied contracts, 422
Indebtedness, allegation of complaint, 470
Injunction against executed proceedings, 409
Insolvency, dissolution for, 533
Intervention, 548
assignee, 549
claimants of different classes, 549
determination of rights, 550
interest of party, 548
pleading and practice, 550
priorities, 550
right to intervene, 548
Irregular proceedings, 429
Issuance, see Writ
Joinder of parties, 471
several causes, 472
Judgment in principal action, 404, 473
action to set aside attachment judgment, 481
effect of judgment for defendant, 477
merger of lien in, 487
nonresident, judgment against, 474
satisfaction of, 475
surety, rights of, 481
Jurisdiction of court, 429
appearance by defendant, 469
character of action, 464
property, necessity of jurisdiction, 465
service by publication, 467
Levy, transfer of property after, 484
Lien, 482
abandonment, 487
appeal, effect of, 478
lien pending, 486
bankruptcy proceedings, 485
continuance, 485
creation, 482
crops, 486
effective when, 482
equitable interest, 483
expiration, 485

[The numbers in this Index refer to pages]

ATTACHMENT—Continued.
Lien, extent of, 483
fraudulent transfer, 484
goods not seen, 483
irregularities, 483
judgment, merger in lien in, 487
merger in judgment, 487
stock attached, 488
mortgage after attachment, 484
mortgagor's interest, 483
nature, 482
new affidavit and undertaking, 486
personal property, 488
possession of property, 482
priorities, see Priorities
real property, devise by will, 485
levy on, 482
merger in judgment, 488
subject to deed of trust, 484
vendor's lien, 419
return, defective, 483
time, effect, 485
title of debtor, 482
transfer of property after levy, 482, 484
Malicious attachment, see Wrongful Attachment
Maturity of demand, 424
Mechanic's lien, concurrent remedy, 408
Merger of lien in judgment, 487
Mortgages, priorities, 494
statute of limitations, 422
Nature of remedy, 405
Nonresidence as grounds of attachment, 427
meaning of, 428
Nonresidents, appearance by defendant, 469
judgment against, 474
jurisdiction over, 465
service on, 467
special appearance, 481
Objects, 406
Obligor's liability, see Release; Undertaking
Other remedies, concurrence of, 408
Parties by and against whom attachment lies, 409
banks, 412
corporations, 412
creditors, remedy designed for, 409
debtors whose property may be attached, 411
director of corporation, 410

ATTACHMENT—Continued.
Parties, indorsers, guarantees, and sureties, 411
insolvent debtors, 410
interpleader, defendant in, 410
intervention in proceedings, 548
member of benefit society, 410
misnomer, 471
national bank, 412
nonjoinder, 471
nonresidents, 411, 414, 427
cause of action against, 409, 410
partnership, 411
residence, 411
trustee, 411
Partnership affairs, 411, 412
property, priorities, 488
Personal property, rights of buyer and seller, 502
Persons, see Parties
Pleading, complaint, allegations of, 470
amendment of complaint, 472
dissolution of attachment for insufficiency, 541
intervention by claimants, 550
misnomer of parties, 471
prayer for relief, 470
release, action against obligors, see Release
undertaking to release action on, 528
wrongful attachment, action for, 554
Pledge as security, 421
rights of pledgee, 498
Power of writ, see Writ
Preference, see Priorities
Prevention of attachment, 507
Principal action, proceedings in, 464
Priorities, 488
attacking lien, 506
assignees, rights of, 500
attachments generally, 488
bailees, rights of, 499
bankruptcy, 500
carriers, rights of, 504
chattel mortgages, 494
effect of recording, 496
loss of priority by subsequent disposition of property, 497
removal of property from county, 498
claims generally, 490
collusive attachment, 490
confession of judgment, 491
corporate stock, 504

[The numbers in this Index refer to pages]

ATTACHMENT—Continued.
Priorities, courts, writ issued by different, 488
crops, 491, 497
debt not due, 490
deeds not recorded, 492, 493
determination of, 506
equities and rights, 491
execution on judgment, 507
fraud, 490
fraudulent conveyance, 493
insolvency, assignee in, 500
insufficiency of first attachment, effect of, 489
intervention, determination of rights, 550
irregularities and informalities, 506
judgment liens, 491
mortgages of realty, 494
motion to determine, 507
notice of lien, 492
order of court, 507
partnership property, 489
personal property, rights of buyer and seller, 502
pledge, shares of stock, 505
pledgees, rights of, 499
premature levy, 490
proceedings to determine, 506
real property, 492
receivers, foreign, 502
rights of, 501
relation back of deed, 507
doctrine of, 493
sales of personalty, 502
conditional contracts, 504
stoppage in transitu, 504
secret lien, 491
shares of stock, 504
statutory priorities, 492
stock, unregistered transfer, 504
time, determination by, 488
transfer invalid under statute of frauds, 491
trust agreement, reformation of, 493
vendor's rights, 491
writs, order of receipt, 488
Proceedings to procure, 429
collateral attack, 430
in principal action, 464
nature of, 402
void and voidable, 430
Process, abuse of, see Wrongful Attachment
concealment of defendant, 466
issuance and service of, 466
nonresidents, 467
publication, service by, 467
ATTACHMENT—Continued.
Provisional remedy, 405
Purpose of seizure, 406
double purpose, 406
Real property, see Lien; Mortgages
deeds, priorities, 492
fraudulent conveyance, 409
vendor's lien, 419
Receivers, rights of, 501
Release, 510
accrual of liability of obligors, 517
action on undertaking, 517
accrual of liability, 517
demand, form of, 520
demand, necessity of, 518
demand, pleading of, 521
pleading, 528
return, effect of premature, 524
return of execution as prerequisite, 522
assignment of cause of action against sureties, 530
bankruptcy or insolvency, effect of, 526
code provisions, 510, 511, 512, 513
common-law bond, 514
consent, judgment against obligor, 518
delivery of undertaking, 515
discharge of obligors generally, 524
by tender or payment of amount of judgment, 526
dissolution of attachment, 515, 516
effected how, 510
estoppels arising from execution of undertaking, 531
form of undertaking, 514
justification of sureties, 513
justices' courts, writs from, 512
liability of obligors, measure of, 529
order of court, 511
property exempt, 518
refusal of defendant to redeliver, 521
security, release on, 511
several obligors, 518
sheriff's authority, 511
staying execution, 516
sureties, estoppel of, 531
two or more defendants, 512, 516
Remedies, incompatible, 408
Remedy, nature of, 405
Residence of debtor, 411
see Nonresidence

[The numbers in this Index refer to pages]

ATTACHMENT—Continued.
Return, see Writ
Rights, see Priorities
Sales, rights of buyer and seller, 502
vendor's lien, 419, 420
Scope of article, 402
Security, character of to prevent attachment, 419
contract for, 418
exhaustion of, 418
liability of sureties, 509
mortgage, 422
pledged property, 421
prevention of demand, 507
release on, see Release
valueless security, 421
what is, 418, 419
Seizure, purpose of, 406
Service of process, see Process
Several remedies, pursuit of, 408
Several rights, priorities, 438
Sheriff, see Writ
Statutes, rules of construction, 407
Statutory remedy, 404
Stock, unregistered transfer, priorities, 504
Summons, see Process
Sureties, see Security; Release; Undertaking
liability of, 509
Survey of California law, 403
Tort, action founded in, 414
Transfer of property, after levy, 484
Undertaking, 448
affidavit of sureties, 450
amendment, 449
amount, 449
city, county or state as party, 450
compliance with statute, 449
damages for wrongful attachment, 556
defectiveness, 448
dissolution of attachment, 452
government, action by, 449
justice's court, action in, 452
legal effect, 448
liability of sureties, 509
nature of contract, 449
payable to whom, 449
pleading in action on, 509
prevention of attachment, 507
release of attachment, see Release
requirement of, 448
sureties, exception to, 451
justification, 450, 451
waiver of debtor, 452
ATTACHMENT—Continued.
Vendor's lien, 419
Waiver, irregularities, 430
Writ, 452
affidavit, conformity with, 459
amendment, 460
clerk's duty, 453
conformity with complaint, 458
contents, 457
defects, 460
demand, conformity with complaint, 458
directed to whom, 457
execution, writ as, 452
irregularities, 460
issuance, 453
order of, 456
time of, 455
malicious suing out, see Wrongful Attachment
nature of, 452
object, 453
plural writs, 454
process, writ as, 452
return, 461
amendment, 463
bond, conclusiveness, 463
description of property, 462, 463
evidence, return as, 463
general return, 462
lien not dependent on, 463
officer's duty, 461
parol evidence, 463
purpose, 461
second attachment, 462
statements in, 462
several writs, 455
Wrongful attachment, 551
Wrongful attachment, accrual of right of action, 553
damages as dependent upon character of property seized, 557
for malicious attachment, 555
in action on undertaking, 556
duress or goods, 553
elements of cause of action, 551
excessive levies, 553
malicious attachment, 552
measure of damages, 556, 557
pleading in action for damages, 554
remedies available, 551

ATTEMPT—
See cross-reference title

[The numbers in this Index refer to pages]

ATTORNEY GENERAL—
Actions, bringing, 561
lapse of time, 561
Appearance for state, 560, 569
Assistance, 563
Assistants, compensation of, 574
Authority, expiration of term, 560
Bank Act, penalties and forfeitures under, 573
Bond, official, 560
Charities, enforcement of, 567
Chief law officer, 560
Clerks and stenographers, 563
Compensation, 573
constitutional and statutory, 561
traveling expenses, 575
Control of litigation, 564
Corporations, competition by, 573
directors, action against, 572
dissolution, 572
foreign, 573
inquiring into affairs of, 572
insurance companies, 572
investment companies, 572
suits against, 572
usurpation, disposition of franchises, 572
Court reports, publication of, 569
Criminal prosecutions, conduct of, 566
Deputies, 563
Discretion, exercise of, 562
instituting proceedings, 563
Dismissal of suits, 565
District attorney, supervision over, 564
Duties in general, 568
mandamus to compel performance, 569
ministerial and judicial, 560
power of legislature as to, 568
Election, 559
Elections, preparation of ballots, 570
Escheated property, 564
recovery of, 573
Impeachment, 560
Insurance commissioner, documents issued by, 570
Legal advice, duty to furnish, 570
Legal affairs, supervising, 559
Municipal bonds, purchase of, 570
Nature of office, 559
Nuisances, abatement of, 566
Other attorneys, recognition of, 560
Opinions, 569

ATTORNEY GENERAL—Continued.
People, representative of, 560
Powers, 561
appointive and supervisory, 563
appointment of agent, 564
demurrer, raising question by, 562
granting leave to individuals, 563
ratification by legislature, 562
Private interest, acting for, 561
proceeding by relation, 561, 562
Public officers, action for recovery of, 571
Public utilities, 570
Purpresture, erection of, 567
Relation, proceedings by, 561, 562
Residence, 559
Revenue officers, inspection of books, 570
Special counsel, employment of, 563
fees of, 575
State officers and boards, actions by and against, 570
Suit in name of state, 563
Tax, delinquent, 570
Trust, enforcement of public, 567
Vacancy in office, 560
Waters, obstruction of streams, 567
pollution of, 567

ATTORNEY IN FACT—
See cross-reference title

ATTORNEYS AT LAW—
Absent heirs, assignment of attorney by court, 611
Action, authority to institute, 658
for compensation, see Compensation
to enforce liability, see Liability
Admission
bar examiners, 592
board of, 592
examinations by, 594
qualifications of members, 593
recommendation of, 591
character, finding as to, 594
good moral, 594, 596
inquiry as to, 596, 597
proof of, 597
setting aside order of admission, 601
citizenship, requirement of, 595
constitutional rights, 587

[The numbers in this Index refer to pages]

ATTORNEYS AT LAW—Continued.
Admission, district court of appeal, 590
effect, right to practice, 599
eligibility in general, 595
examinations, 594
fees, 593
females, 596
fraudulent concealments, 601
jurisdiction to admit, 590
to examine, 591
to regulate practice, 589
legislative control, 589
license, necessity for, 588
municipal regulation, 590
oath, 595
order of admission, 594
nature of, 599
setting aside, 600, 601
other states, appearance by comity, 598
attorneys from, 591, 597, 598
personal appearance, 594
procedure for admission, 593
right to practice, 587
"property" and "contracts," 588
signing roll, 595
supreme court, interference in, 591
jurisdiction to revoke order, 601
women, 596
Adverse interest, acquirement of, 619
see Dealings With Client
Adverse position, assumption of by attorney, 618
Advertising, illegal, 607
Agents, employment of, 609, 610
Appeals, attorney's authority, 669
by attorney not of record, 638
compensation of attorneys, questions on appeal, 718
liability for failure to take, 672
substitution of attorneys, method during appeal, 641
Appearance, 647
burden of proof, 649
comity, attorneys from other states, 598
denial of authority, 649
effect of authority, 661
for one not a party, 648
in propria persona, 585
jurisdiction of court, 661, 662
presumption of authority, 647
method of attacking, 660
rebuttal of, 649

ATTORNEYS AT LAW—Continued.
Assignment by court, 610
compensation, 611
statutory provision, 610
substitution, 611
Assistant counsel, authority and compensation, 645, 646
employment, authority, 609
Associate counsel, compensation, 702
Authority, 644
action, institution of, 658
not authorized, proper procedure, 659
acts exclusively for attorney, 656
admissions, at trial, 666
agent for client, 653
agent, attorney as, 644
appeals, dismissal, 670
proceedings on, 669
ratification, 647
appearance, see Appearance
assistant counsel, 646
associate counsel, 645
bill of exceptions, 653
burden of proof, 654
clerk, agreement filed with, 652
client, acts by not permitted, 656
appearing in person, 656
recognition of, 654
compromise and settlement by client, 657
compromising, 663
conduct of cause, 653, 654, 656, 657, 665, 666
conduct of litigation, 652, 659
consent to judgment, 666
control to exclusion of client, 654
coparties, attorney for one, 657, 658
criminal cases, 653
death of client, 631
delegation of, 645
discharge of claim, 652
dismissal, 656, 657, 664
action not authorized, 659
duty and authority at, 665
estoppel of client, 647
evidence, testimony of attorney, 645
execution, buying for client, 668
issuance of, 657
expenses of litigation, 646
guardian ad litem, attorney for, 654
institution of suit, 658

[The numbers in this Index refer to pages]

ATTORNEYS AT LAW—Continued.
Authority, instructions of client, 654
judgment, authority after, 668
by consent, 666
consent to increase, 668
receiving money, 669
satisfaction and discharge, 652, 669
letter from client, 645
management of suit, 654
mandamus, 656
minutes, entry upon, 652
money, receipt of, 652
new trial, notice of, 653
pleadings, admission of party, 660
authority as to, 659
introduction in evidence, 659
presumption of, 644, 647
ratification, 645
references, 665
retainer, proof of, 659
retraxits, 664
right, surrender of, 667
satisfaction, acknowledgment of, 652
scope of, 644
secret intentions, 645
settlement of the case, 666
see Compromise
several counsel, 645
several parties, attorney for one, 657
signature, genuineness, 646
silence of client, 646
special authority, 644, 645
stipulations, 655, 660
contempt cases, 668
filing and entering, 661, 662
presumption as to, 661
statute regulating, 661
taking, 670
trial of cause, 666
tender of money, 654
passing upon, 668
termination of relation, 628–633
time for performance of certain acts, 653
unauthorized acts, ratification of, 646
venue, matter of, 657
waiver for one of several parties, 658
Bar examiners, see Admission
Barratry, 607
Brief, groundless charges, 605
Business, tax on, 586
Buying debt, 607
Capacity in which act done, 609

ATTORNEYS AT LAW—Continued.
Care required, see Liability
Change of attorneys, see Substitution
Character, see Admission; Disbarment and Suspension
Client, acts exclusively for attorney, 656
contract with, 608
control by attorney to exclusion of, 664
creation of relation, 608
dealings with, see Dealings with Client
death of, 631
duties to, see Duties
liability, see Compensation
liability to client, see Liability
notice to, see Notice
relation to, 608
substitution of attorneys, right of, 635
termination of relation, see Termination
Collections, demand, necessity of, 621
duties as to, 620
see Liability
Comity, appearance by attorneys from other states, 598
Common barratry, 607
Compensation, 679
absent heirs and legatees, representation of, 681
actions for, 705
accrual of cause, 705
burden of proof, 715
complaint in suit to recover, 708, 709
findings, 717
payment, pleading, 709
pending appeal, 706
pleadings by attorney, 708
admission to practice, 708
by client, 710
promise of payment, 709
quantum meruit, 706
right to claim, 679
suit for specific performance, 707
verdict, 717
additional, agreements for, 685
additional services, 700
advances for prisoner, 681
adverse party, compensation from, 679
agreement for, 684
where relation exists, 685
agreement, see Contracts, infra

[The numbers in this Index refer to pages]

ATTORNEYS AT LAW—Continued.
Compensation, amount, 696
bad bargain, 696, 697
contract, fee set by, 696
facts to be considered, 698
interest, 698
reasonableness of contract, 697
service less than contemplated, 696
unconscionable contract, 697
appeal, question on, 718
appointment by court, effect of, 680
assignment of, 680
assistants, employment of, 702
associated counsel, 646, 647
burden of proof, 715
client fixing fee, 706, 709
compromise, effect of, 703
contingent fee, 691
compromise, effect of, 695
divorce cases, 693
duties of attorney, 694
employment of another attorney, 694
implied contract, 693
rights of attorneys, 694
settlement by client, 695
validity of contracts, 691
contracts for stated compensation, 684
administrators, 688
amount of fee set by, 698
collection of claim, 688
construction, 686
contingent fees, see Contingent Fee, supra
continuing until final determination, 687
corporations, 689
courts in which to appear, 687
division of fee with layman, 689
evidence by receipt, 684
firm of lawyers, fee for survivor, 690
guardians, 688, 689
minors, 688
pending litigation, 687
public policy, 690
ratification, 689
services covered, 687
specific performance, 707
time of making, 685
unauthorized contracts, 688
costs, lien for, 683
court appointments, 680

ATTORNEYS AT LAW—Continued.
Compensation, criminal cases attorney appointed by court, 680
detective, employment of, 702, 703
disbursements, 702
discharge, effect of, 703
division of fees with layman, 684
evidence, contract and relationship of parties, 712
expert testimony, 713
expert testimony, conclusiveness of, 714, 715
value of service, 710–712
expenses incurred, 702, 703
fee fixed by client, 684
firm or joint services, 701
surviving member of firm, 681
inferences, 686
joint services, 701
land, agreement to take, 684
law partnership, see Partnership, infra
liens for fees, 682
for costs, 683
retaining, 683
loan, negotiating, 684
lobbying services, 684
money expended by attorneys, 702
paid by client, credit by attorney, 680
negligence, effect of, 704
outlays, 702
partnership between attorneys, 681
fees for survivor of firm, 681, 690
services by, 701
winding up, 682
pleading in action to recover, 708
retaining fee, 699
right to, 679
satisfaction, client entering, 682
settlement by client, 683
effect of, 703
several attorneys, 701
specific performance of contract, 707
unskillful services, 705
value of services, burden of proof, 715
effect of negligence, 704
evidence as to, 710
questions on appeal, 718

[The numbers in this Index refer to pages]

ATTORNEYS AT LAW—Continued.
Compromises, authority of attorney, 663
effect of on compensation, 695, 703
Conduct, duty towards court, see Court
Conduct of litigation, see Authority
Conducting own case, 585
Consent judgment, attorney's authority, 666
Contingent fees, see Compensation
substitution of attorneys, 636
Contract, persons who may employ attorneys, 609, 610
relation of attorney and client, 608
see Compensation
termination over relation with client, 628–633
withdrawal by attorney, 629
Control of cause, see Authority
Coparties, attorney for one of several, 657
Corporation tax, see Taxation
"Counsel," 583
Court, assignment of attorney by, 610
attorneys as officers of, 601
criticism of, 605
duties to, 604
good faith, parties, 605
misleading, 605
relation to, 601
respect for, 604
Crime, appointment to defend persons accused, 680
barratry, 607
buying debt, 607
illegal advertising, 607
Criminal cases, assignment by court, 610
see Disbarment and Suspension
Criticism of court, 605
Cross-examination, attorney as party, 585
Damages, see Liability
withdrawal by attorney, 630
Dealings with client, 622
conveyance and purchase, 622
good faith, requirement of, 623
information, requirement of, 623
pleading and proof, 627
presumption of invalidity, 624, 625
limitations on, 626
validity in general, 622
ATTORNEYS AT LAW—Continued.
Death of attorney, 632, 633
partner in law firm, 633
Definitions, 583
Determination, attorney's authority, 664
Disbarment and suspension, 719
accusation, notice, 739
pleadings generally, 741
verification, 742
appeal, 749
appeal by accused, 750
certiorari, 749
charges, notice of, 739
courts, jurisdiction of, 720, 721
effect, 748
degree of proof, 744
rule on appeal, 745
grounds, 722
action not justifying disbarment, 728, 729
advertising, improper, 728
assuming adverse position, 726
character and general conduct, 727
city attorney, 726
clients, necessity for criminal proceedings, 734, 735
code provisions, 722, 723
commission or conviction outside of California, 733
concealment, 725
confidence, violation of, 727
conviction of crime, 731
crimes involving moral turpitude, 731
effect of appeal, acquittal or pardon, 735–737
defending accused person after encouraging prosecution, 726
disrespect to court, 724
duelling, 728
false affidavit, 725
false charges, 724
giving worthless sureties, 728
illegal or unjust proceedings, 725
improprieties in trial, 728
loss of character, 727
misconduct outside profession, 727
misconduct toward client, 726
misconduct toward court, 723
mitigating circumstances, 730
money, transactions concerning, 726
perversion of justice, 724
receiving stolen money, 728

[The numbers in this Index refer to pages]

ATTORNEYS AT LAW—Continued.
Disbarment and suspension, hearing and determination, 750
indefinite suspension, order of, 747
judges, actions against, 750
judgment of disbarment, 746
modification, 750
jurisdiction, 720, 721
justice of peace, 720
reinstatement, application for, 753
supreme court, 720
limitation of action, 738
mandamus, 749
reinstatement, 753
notice refused, 739
order of court, 746, 747
parties, 749
pleadings, 742
power, source of, 721
practice, reinstatement, 751
proceedings, 737
accusation in writing, 741
conviction of crimes, 739
degree of proof, 744
evidence, 743
findings and judgment, 746
initiation of, 738
notice, requirement of, 739
orders of indefinite suspension, 747
pleadings generally, 742
pleadings on part of accused, 742
trial, 743
verification of accused, 742
protection of public, 719
punishment, disbarment as, 720
relief from order, 749
reinstatement, application for, 752
evidence admissible, 752
jurisdiction, 753
mandamus, 753, 754
right to, 751
rights, deprival of, 748
superior court, jurisdiction, 722
supreme court, jurisdiction of, 721
modification of judgment in, 750
transfer to, 750
writ of error, 750
Disbursement, liability for, 702
Discharge by client, 628
effect of on compensation, 703
Dismissal, attorney's authority, 665
Distinctions, 583

ATTORNEYS AT LAW—Continued.
Division of fees, 689
Divorce cases, contingent fees, 693
Duties, adverse interest, acquirement of, 619
antagonism towards client, 618
assumption of adverse position, 618
barratry, 607
buying or becoming interested in debt, 607
code provisions, 603, 616
client, duties to, 615
collection of money, 620
demand, 621, 622
conveying property, 617
court, duties to, 604
good faith, 616
personal advantage, 617
personal representatives and heirs, attorney for, 619
purchasing interest in thing in controversy, 620
statutory, 603
Eligibility, see Admission
Employment, assistant counsel, 609
parties who may employ, 609
Ethics, 604–608
duties to courts, 604
duties to clients, 615
Evidence as to compensation, see Compensation
Examination, see Admission
Executor, employment of attorney, 610
Exemptions, liability to act as jurors, 585
library and office furniture, 585
service of civil process, 585
Expenses, liability for, 702
Expert testimony as to Compensation, see Compensation
Fee, see Compensation
corporation, 610
Fiduciary, capacity, 616–617
Firm, see Partnership
Foreign attorneys, admission to practice, 597
service of civil process on, 585
Good faith towards client, 616
Guardian, directing legal services for, 611
Imputation of notice, see Notice
Judgment, see Authority
Jurisdiction to admit, 590
Jurors, liability to act as, 585
Justices' courts, practice in, 588
Knowledge, see Notice

[The numbers in this Index refer to pages]

ATTORNEYS AT LAW—Continued.
Legislative control of practice, 589
Liability, 670
appeal, failure to prosecute, 674
books, failure to consult, 674
burden of proof, 675
care and skill required, 670, 671
client, liability limited to, 672
collection of claims, 675
liability concerning, 676
summary proceedings for, 677
contempt, 679
defense, failure to set up, 672
damage as essential element, 671
degree of diligence, 671
execution, delaying levy, 672
failure to take appeal, 672
foreclosure suit, neglect in, 672
instructions of client, 670
disregard of, 674
failure to observe, 674
legatee, liability to, 673
lien, advice not to file, 674
lis pendens, failure to file, 672
money collected, 676
received on statement, 677
negligence, actions for, 675
finding, 676
question of law, 675
rule as to, 670
what constitutes, 674
new trial, negligence as to, 674
officer of court, effect of attorney being, 678
pleading and actions for negligence, 675
predicating negligence on, 675
repayment of money received for services, 678
statute of limitations, 676
predicating negligence on, 675
summary proceedings, 677
will, drawing of, 673
Library, exemption of, 585
Licenses, see Admission; Practice; Taxation
Liens of attorneys, 682
Mandamus, substitution of attorneys, 636
Minors, assignment of attorney by court, 611
Misconduct, see Court; Crimes; Dealings with Client; Disbarment and Suspension; Liability
Money received, see Liability
Moral character, see Admission
ATTORNEYS AT LAW—Continued.
Municipal corporation, regulation of practice, 590
Municipal taxation, 586
Negligence, effect on compensation, 704
see Liability
Notice, appeal, notice of, 614
arbitration proceedings, 613
attorney's partner, 612
constructive, 612
defects of title, 612
earlier transactions, 615
failure to communicate knowledge, 613
imputation of, 611
letters to attorney, 612
presumption of, 613
prior transactions, knowledge contained in, 614
Oath, 603
Office furniture, exemption of, 585
Officer of court, 601
Order of admission, see Admission
Partition suit, assignment by court, 610
Partnership, contract of employment, surviving member, 681
death of partner in law firm, 633
dissolution, winding up business, 682
fees for survivor of firm, 690
firm or joint services, compensation for, 701
Party, attorney as, 585
Persons who may employ, 609
Pleadings, action for compensation, 708–710
authority concerning, 659
Power, see Authority
Practice, character of professional work, 609
constitutional rights, 587
justices' courts, 588
nature of right, 587
penal provisions, 587
Practice, see Admission
Presumptions, dealings with client, 624–626
Privileges, 584
Public officers, attorneys as, 602
Purchase from client, see Dealings with Client
Reference, attorney's authority, 666
Regulation of practice, see Practice

[The numbers in this Index refer to pages]

ATTORNEYS AT LAW—Continued.
Relation to client, 607
creation of, 608
evidence as to existence, 609
Relation to court, see Court
Removal of attorney, 632
Respect for court, 604
Retainer, contract with client, 608
Retainer, meaning of, 583
see Compensation
Retaining fee, see Compensation
Revenue, license for, 586, 587
Right to practice, see Practice
Scope of article, 582
Service on foreign attorney, 585
Services, see Compensation
Settlement, attorney's authority, 666
Solicitors and barristers, 583
Specific performance, contracts for compensation, 707
Stipulations, see Authority
Substitution, 634
appeal by attorney not of record, 638
appeal from order, 640
method during appeal, 641
application, 640
attorney assigned by court, 611
authority of old and new attorneys, 637
code provisions, 634
contingent fees, effect of agreement, 636
criminal cases, 638
mandamus, availability of, 636
manner of making change, 634
method of, 639
necessity for, 637
notice, 640, 643
application for change, 642
effect of insufficient notice, 642
orders, 638
rights of client, 635
rights of new attorney, 634
written notice, 643
Summary proceedings for collection, 677
Survey of California law, 583
Suspension, see Disbarment and Suspension
Taxation, municipal licenses, 586
revenue purposes, 586
Termination, death of attorney, 633
death of client, 631
discharge by client, 628
removal of attorney, 632
withdrawal by attorney, 629
ATTORNEYS AT LAW—Continued.
Trial, attorney's authority, 665
Unlawful practice, 584, 588
Will, contest, assignment of attorney by court, 610, 611
Withdrawal, 629

ATTORNMENT—
See cross-reference, 754

AUCTIONS—
Agreements not to bid, 760
Auctioneer, acting illegally, 765
agency of, 758
authority of, 757
authorization, 765
commission, 764
compensation, 763
delegation of authority, 758
entry by, 762
land sales, 757
liability, 764
memorandum of, 762
mock auction, 765
sheriff or constable as, 756
termination of authority, 758
who is, 756
who may become, 756
Bid, withdrawal of, 762
Bidder, rights of, 759
Conduct and validity of sales, 758
Definitions, 755
Deposit of earnest-money, 764
Enforcement of sale, 762
Fraud, 760
Licenses, 756
Memorandum of sale, 761
Mistake as to quantity, 763
Mock auction, 765
Mortgaged property, 763
Penalties, 756
Place of business, 757
Price, inadequacy, 763
Puffing and by-bidding, 759
Real property, refusal to accept, 763
sale of, 759
Record of sale, 757
Regulation, 756
Sale at auction, 756
completion of, 762
Scope of article, 755
Statute of frauds, 761
Stifling competition, 760
Stock in trade, sale of, 759
Stolen property, 765
Terms and conditions, 759

AUDITORS—
See cross-reference, 765

[The numbers in this Index refer to pages]

AUTOMOBILES—
Actions, 938
Agency, evidence as to, 979
independent contractors, 863
Agents, see Employees; Sales
husband and wife, 859
presumption of ownership, 860
responsibility of owner, 857
Animals, duty toward, 886
evidence in cases of collision, 981
Appeal, conflicting evidence, verdict or findings based on, 948
physical facts, reversal for conflict with, 950
record, failure to incorporate map, 949
reversal in negligence cases, 947
Automobile, meaning of, 774, 775
Backing car into parking space, 888
Bailment, lien for repairs, 801
pledge, 800
Barriers and warning lights, 901
Bicycles, coasting down grade, 896
collision, pleading, negligence, 890, 954
meeting and passing, 898
Brakes, validity of regulation, 787
Bridges, speed at, 902
Burden of proof, 962
Buses, see Jitney Buses
California law, survey of, 776
Carriers, see Passengers
Chauffeurs, see Employees
Child, bicycle, child on, 848
Children, injuries by or to, 847
Collision, see Negligence
appeal, grounds for reversal, 947
incorporation of map in record, 949
automobiles colliding, 889
backing car, 888
bicycles, 890
both cars in center of road, 890
damages for, 809
electric poles along highway, 900
evidence, 967; and see Evidence
admissions, 972
conflict with physical facts, 950
findings, inconsistent, 944
special, 942
sufficiency of, 942
following car colliding with one ahead, 890
horse-drawn vehicles, 891
instructions as to, 985–1009
intersections, collisions at, see Intersections

AUTOMOBILES—Continued.
Collision, last clear chance doctrine, 933–937
law of the road, 892
bicycle coasting, 896
bicycles, meeting and passing, 898
conflicting evidence, 948
construction work, 894
crossings, see Intersections
dark night, 895, 896
delivering goods, 894
driving on wrong side, 893
duty on meeting and passing, 897
instances of improper use, 895
instructions, 995
intersections, right of way at, see Intersections
municipal ordinance, 893, 894
negligence per se, 893
ordinances as affecting duty, 899
overtaking and passing, 898
passing other vehicles, proximate cause, 929
passing to right and left, 892
permissible uses of left side, 894
question of law and fact, 895–898
slow-moving vehicles, 896
standing vehicle, 897
street-cars, 895
swerving to left, 895
unsuitable roadway, 894
using right-hand side, 892, 893
motorcycle, turning out to pass, 889
negligent or willful injury, pleading, 953
pedestrians, see Pedestrians
pleading, see Pleading
proximate cause in passing other vehicles, 929, see, also, Proximate Cause
right of way, see Intersections
stalled automobile, 892
standing at curb without light, 890
steam roller, 889
stopping at curb, 891
street-cars, 892
collision with, see Street Railway
turning in, road clear, 930
variance and trial, 960
Conditional sales, see Sales
Conflict of laws, 790–795

[The numbers in this Index refer to pages]

AUTOMOBILES—Continued.
Constitutional law, see Regulation
Construction, passengers, injuries to, 992
Contractors, barriers and warning lights, 901
Contracts, 799
Contributing cause of injury, 927
Contributory negligence, see cross-references under Negligence
assumption that person will obey law, 840
children, 847
closing eyes to danger, 840
deaf persons, 891
degrees, 839
horseback rider, 887
imminent peril rule, 841
last clear chance doctrine, 933
rule applied, 935
miscalculation, 841
passenger at railroad crossing, 855, 856
pedestrians, see Pedestrians
person to whom defense is open, 840
proximate cause, 840
recklessness and willfulness, 840
sudden danger, 841
sympathy for injured, 841
Crimes, 1009
complaint or information, 1013
criminal offense, 1014
evidence in general, 1015
failure to stop after accident, 1010
criminal complaint, 1013
sufficiency of evidence, 1018
instructions on, 1019
jurisdiction and venue, 1011
larceny, 1011
weight and sufficiency of evidence, 1017
new trial, 1019
speed, unreasonable, 1009
stopping after accident, 788
trial of criminal offense, 1014
cross-examination and redirect examination, 1016
Crossing, see Intersections; Railroad Crossings; Street Railways
Cross-roads, see Intersections
Damages for injury, 799, 809
evidence as to financial condition of parties, 968
wrongful detention, 809, 810
Deaf persons, duty of, 891
Dealer, insurance policy to, 803
AUTOMOBILES—Continued.
Defective highway, barriers and warning lights, 901
evidence, presumption of due care, 966
knowledge of condition, 901
proximate cause of accident, 932
uncompleted road, 902
unknown road, 902
Definition, 774
Discrimination, legality, 784
Distinctions, 774
Driving personally or through agent, 846
law of road, see Collisions
right of way, see Intersections
Electric poles along highway, 900
Electric railways, see Railroad Crossings; Street Railways
Employees, borrowed car, 857
chauffeur's negligence, 857
disobedience of instructions, 866
doctrine of respondeat superior, 856
driving car, 846, 847
evidence, character and capacity of driver, 969
employer's liability, 969
intoxication, 970
exonerating servant, 945
going to and returning from work, 868, 869
independent contractors, 863
instructions as to persons liable, 985
joint tort-feasors, 938
loaned by dealer to employee, 868
owner's control, 858
owner's responsibility, 857
ownership and agency of car, 979
permission to use car for own purpose, 867
personal business or pleasure of chauffeur, 866, 867
presumption of ownership, 860
relationship of master and servant, 856
responsibility for, 863
roadway, 863
scope of employment, rule as to, 865
test of liability, 865
Evidence, 962
admissibility in general, 967
admissions, proof of, 972
admissions, tacit, 973
animals, collision with, 982

[The numbers in this Index refer to pages]

AUTOMOBILES—Continued.
Evidence, burden of proof, 962
collision with other vehicles, 982
conflicting, verdicts or findings based on, 948
contributory negligence of motorist, 984
burden of proof, 965
criminal offenses, see Crimes
criminal trials, 1015
cross-examination and rebuttal, 978
driver's character and capacity, 969
employer, liability of, 969
expert and opinion evidence, 976–979
financial condition of parties, 968
instruction as to consideration of evidence by jury, 1008
intoxication of driver, 970
judicial notice of character, 778
operation of horse-drawn vehicles, 970
ordinances, 974
harmless error in admitting, 975
other violations by defendant, 971
passengers, injuries to, 980
pedestrians, collisions with, 981
physical facts, reversal for conflict with, 950
pleading, see Pleading
presumption of due care for one's own safety, 966
res ipsa loquitur, doctrine of, 964
speed, estimates as to, 977, see, also, Speed
judicial notice, 962
Exemption from execution, 808
Family relation, effect of, 859
Fees, see Regulation
Findings, see Trial
necessity for special, 942
Fire, negligence of employee of gasoline station, 799
Gasoline station, negligence of employee, 799
Headlights, criminal complaint, 1013
validity of regulation, 787
Highway, see Defective Highway
Horn, see Signal
Horseback riders, contributory negligence, 887
duty to, 886
AUTOMOBILES—Continued.
Horse-drawn vehicles, collisions with, 891
instructions, 995
Husband and wife, use of car by wife, 859
Imminent peril, instructions as to, 988
Independent contractors, 863
liability of owner, 858
Infants, see Children
injuries by or to, 847
Instructions, burden of proof, 1009
contributory negligence, 986
criminal trials, 1019
electric railway crossings, collisions at, 998
evidence, consideration of by jury, 1008
horse-drawn vehicles, collisions with, 995
imminent peril, 988
last clear chance doctrine, 1004
covering doctrine in other instructions, 1005
requirement of actual knowledge of plaintiff's peril, 1006
law of the road, 995
machines approaching from rear, 991
negligence or willful injury, 989
operation of machine, 990
passengers, control of driver, 992
pedestrians, injuries to, 993
persons liable, 985
proximate cause, failure to instruct in terms, 1003
form of, 1002
necessity for instruction, 1002
railroad crossings, collisions at, 1001
right of way, 998
speed of car, 990
street intersections, injuries at, 996
street railway, duty of motorman, 999
Insurance, 803
actions on policies, 807
agents and brokers, 806
authority of agents, 806
conversion and embezzlement, pleading, 808
dealer's policy, 803
description of car, 804
evidence as to liability insurance, 968

[The numbers in this Index refer to pages]

AUTOMOBILES—Continued.
Insurance, jitney buses, 797, 798
jury, examination, 939
larceny of car, 805
pleading, 808
misrepresentation of agent, 807
mistake in application, 805
obtaining wrong kind, 805
proof of loss, 806
reformation of policy, 805
waiver of proof of loss, 806
warranties and representations, 804
wrongful conversion, 803
Intersections, assumptions by driver, 903
care required, 902
circumstances considered, 907
definition, 902
evidence, 968, 982
instructions in actions for injuries at, 996, 997
left-hand turn, 909, 910
proximate cause, 931
obstructed view, speed, 905
pedestrians, see Pedestrians
pleading, demurrer, 960
proximate cause of collisions, 930
right of way, 906
instructions, 998
proximate cause of injury, 931
rule applied, 908
vehicles following each other, 909
speed and warning, 903
control of speed, 905
excessive speed, 904
right of way, 906
where view obstructed, 905
street-car passing, view obscured, 904
sudden peril, 907
turning out, 909
Interurban railways, see Railroad Crossings
Jitney buses, bond or insurance policy, 797
insurance policy, liability under, 798
liability under insurance, 798
passengers, see Passengers
regulation of, 796
Joint tort-feasors, 938
verdict, 941
Judicial notice of character, 778
Jury, examination on voir dire, 938, 939
improper conduct, new trial, 947

AUTOMOBILES—Continued.
Jury, inspection of vehicle, 940
instructions to, see Instructions
Larceny, bailee, liability of, 799
criminal offense, 1011
evidence, weight and sufficiency of, 1017
insurance against, 803, 805, 806
Last clear chance, see Instructions
Law of the road, see Collisions
backing car on wrong side of street, 837
Licensing, see Regulation
Lien for repairs, 801, 802
Lights, see Headlights
warning, 901
Map, incorporation in record, 949
Market value as damages, 810
Master and servant, see Employees
Minors, see Children; Regulation
Motor Vehicle Act, nature of, 782
"Motor vehicle," meaning of, 774
Municipal control, see Regulation
Municipal corporations, ordinances, evidence as to, 974
knowledge of, 960
pleadings, 956
violation as negligence per se, 756
Negligence, 835
see Collisions; Contributory Negligence; Defective Highway; Employees; Passengers; Pedestrians; Proximate Cause; Railroad Crossings; Signals; Speed; Street-cars; Towing
acting injudiciously, 837
animals, duty to, 886
appeal, grounds for reversal, 947
assumption that other persons will obey the law, 836
backing car, 837
borrowed car, 857
boys hanging on, 838
collision, both cars negligent, 846
conflicting evidence, 843
verdict or findings based on, 948
degrees of, 835
driver responsible, 846
duty to avoid accident, 836
failure to avoid accident, 837
family relation, effect of, 859, 860
findings, see Trial
guest, duty to, 846
imminent peril, 878
improbable occurrences, 900

[The numbers in this Index refer to pages]

AUTOMOBILES—Continued.
Negligence, imputed negligence, see Passengers
instructions concerning, see Instructions
jury, question for, 843
last clear chance doctrine, 933
meaning of, 835
noise, 839
observation of roadway, 837
ordinance, violation of, 839
parking machine, 849
particular places and circumstances, 900
per se negligence, 839, 844
persons chargeable, 846
purpose of driver, 836
questions of law and fact, 842
relative circumstances, 836
res ipsa loquitur doctrine, 964
rights in case of unregistered machine, 781
standard of care, expert drivers, 837
statute, violation of, 839
verdict, 941
view, looking around windshield, 837
willfulness, 840
Noise as negligence, 839
Official, status of, 787
Operation, see Negligence
Operation in general, 1009
Ordinances, see Municipal Corporations; Regulation
negligence in violating, 839
Owner, see Employee
control by, 858
Ownership, evidence as to, 979
presumption of, 860
Parent and child, see Children
operation of car by child, 860
presumption of ownership, 861
Parking, backing car, 888
Parties, 938
joint tort-feasors, 938
Passengers, see Jitney Buses
alleging negligence in action for injury, 954
business association, 851
care for own safety, 853
control of driver, 848
contributory negligence, 854, 855
driver, control over, 850
duty to warn, 854
interference with, 853
intoxicated, 850
knowledge of carelessness, 849, 850

AUTOMOBILES—Continued.
Passengers,
driver,
reliance on, 853
selection of, 849
duty of, 853
duty to safeguard himself, 854
evidence as to collision, 984
in cases of injury, 980.
family relation, 851
finding as to negligence, 942, 945
inconsistent findings, 944
guest, duty to, 846–848
helper on truck, 852
hiring truck, 852
imputation of negligence, 851
imputed negligence, 848
instructions and actions for injuries, 992, 993
joint tort-feasors, parties, 938
looking and listening, 853
owner becoming, 858
parking machine, 849
railroad crossing, duty on approaching, 855
railway tracks, duty on approaching, 853
selection of driver, 849, 850
sudden peril, contributory negligence, 855, 856
taxicab, direction as to route, 852
title to vehicle, allegations concerning, 957
Pedestrian, admissions by, in answer, 959
approaching from behind, 881
duty of driver, 874
assuming lawful conduct of motorist, 879
assuming that he will not be run down, 878
behind automobiles, coming from, 884, 885
care required of, 877
center of street, pausing in, 876
walking in, 879
child in street, 848
circumstances considered, 880
clutching automobile, 879
confusion of, 879
contributory negligence, imminent peril, 879
crossing street between intersections, 884
when two automobiles approach from opposite directions, 880
crossings, restrictions as to, 870
degrees of care required, 871
driving animal, 871

[The numbers in this Index refer to pages]

AUTOMOBILES—Continued.
Pedestrian, duty to look, 882
duty toward, 870
evidence, admissions, tacit, 973
collision cases, 981
conflict with physical facts, 950
findings, inconsistent, 944
sufficiency of, 942
fire department machine, 881
imminent peril, effect of, 878
injury by saving another, 879
instructions in actions for injuries, 993, 994
jury, question for, 883
laborer on roadway or street, 878
law of the road, presumption of compliance, 879, 880
looking and listening, duty as to, 882
looking for machines coming from behind, 884
looking straight ahead, 883
mounting to seat of truck, 876, 877
negligence toward, instances, 872, 873
pleading, see Pleading
proximate cause of injury, 928, 929
racing with car, 873
reciprocal duties, 871
rights to use of streets, 870
running in front of car, 879
spectator at race, 877
speed of car, 873
excessive speed, 873
stepping from curb, 878
street-cars, boarding and alighting from, 881, 885
crossing in front of, 881, 882
persons boarding or alighting from, 875, 876
safety zone, 882
waiting for, 878
street intersection, injury at, 873
sudden leaving of place of safety, 872
sudden panic, 879
swerving of automobile, 879
unavoidable accident, 876
walking in center of street, 870
Personal agent, see Agents; Employees
Physical facts, evidence, conflict with, 950
Pleading, admissions in answer, 959
AUTOMOBILES—Continued.
Pleading, contributory negligence, 960
demurrers, 960
issues, proof and variance, 960
negligence, allegations of, 952
necessity of alleging in terms, 954
negligent or willful injury, 952
ordinances, allegations concerning, 956
railroad crossing, injury at, 952
specific acts, necessity of pleading, 955
title to vehicle, 957
waiver of defects, 961
Pledge, assignment of contract, 801
conditional sale, 800
Presumptions, see Evidence
ownership, 860, 861
Property rights, general rules, 799
Proximate cause, collisions at intersections, 930
conflicting evidence, 949
contributory negligence, 840, 928
defective highway, 932
imputed negligence, 928
instruction, form of, 1002
necessity for, 1002
last clear chance doctrine, 933
defendant's knowledge of plaintiff's peril, 936
rule applied, 935
law of the road, 928
left-hand turns, 931
passing other vehicles, 929
pedestrian injured, 928
railroad crossing, injury at, 932
right of way, failure to give, 931
rule generally, 927
skidding machine, 929
speed limit, violation of, 928
standing machine, 929
Public regulation, see Regulation
Public service corporations, exemption of, 785
Purchase, see Sales
Race, injury at, 873
injury to spectator, 859
Railroad crossing, driving in front of train, 926
duty of motorist in general, 919
evidence as to collision, 984
findings, exonerating servant, 946
instances of negligence in general, 925
instructions in actions for collision, 998, 1001

[The numbers in this Index refer to pages]

AUTOMOBILES—Continued.
Railroad crossing, interurban, crossing railways, 915
duty of company, 918
duties of motorists, 915
instances of freedom from negligence per se, 917, 918
motorist's negligence per se, 916
speed, 916
last clear chance doctrine, 933–937
looking and listening, duty to leave machine, 924
selecting point for observation, 922, 923
negligence, see Proximate Cause
negligence of company, 926
obstructed view, duty of motorists, 921
passengers in automobile, duty of, 853, 855
pleading, see Pleading
proximate cause of accident, 932
reliance on performance of duty of train crew, 921
speeding, looking and listening, 919, 920
standing cars, 926
street railway crossing, see Street Railways
Railroads, see Railroad Crossing
Regulation, 777
brakes, power to regulate, 787
character, judicial notice of, 778
chauffeurs, right to license, 784
classification of vehicles, 784
constitutionality, 782
brakes and headlights, provision as to, 787
conflict between state laws and local ordinances, 790
due process of law, 785
exemptions, 785
requirement that motorist stop after accident, 788
status of official, 787
title of act, 786
control of streets and highways, 777
crime, stopping after accident, 788
damages, right to by person violating ordinance, 781
discrimination, illegal, 784
due process of law, 785
forbidding use of highway, 778
headlights, approval, testing, 788
power to regulate, 787, 788

AUTOMOBILES—Continued.
Regulation, horse-power, determination of, 785
insurance policy, 797
jitney buses, 796
requirement of bond or insurance policy, 797
judicial notice, 778
licensing by municipalities, 780
constitutionality, 782
fees, validity of imposition, 783
local regulations, see Municipal Control, infra
Motor Vehicle Act, nature of, 782
municipal control, conflict with state laws, 790
conflicts with act of 1915, 794
driving while intoxicated, 795
jitney buses, 796
licensing, 780
speed, 792, 794, 795
traffic as "municipal affair," 793
nonresidents, exemption of, 784
official position, 787
ordinances, see Municipal Control, supra
conflict with state laws, 790
violation of, 781
power to regulate, 777
privileged acts, validity, 783
privileges and rights, 777
public service corporations, exemption of, 786
speed, discrimination of control, 780
municipal control, 780
power to limit, 779
stopping after accident, 788
survey of statutes, 776
taxing, see Licensing
unregistered car, operation of, 781
Repairs, damages for injury, 809
lien for, 801, 802
recovery for, 802
Replevin, lien for repairs, 802
Res ipsa loquitur doctrine, 964
Right of way, see Collisions; Intersections
Sales agencies, 811, 832
Sales, 811
actions for refusal to accept, 815
agent of both parties, 814
authority to bind principal, 832
commissions, 833
purchase by, 811

[The numbers in this Index refer to pages]

AUTOMOBILES—Continued.
Sales,
agent of both parties,
ratification by principal, 833
terms of sale, 833
allowance, amount of, 817
assignment of note by seller, 813
authority to purchase, 811, 812
bill of sale, 811
capacity, warranty of, 817
commission of agent, 833
conditional, 818
assignment by purchaser, 822
assignment by seller, 822
assignment by seller, default in payment, 823
chattel mortgage of employee, 821
conversion of machine, 825
default in payment, 823
default in payment, right to complete purchase, 825
default in payment, seizure by seller, 824
encumbrances created by purchaser, 821
equitable lien, 821
installment payments, 818, 819
investment of money obtained through fraud, 821
lease, contract of, 819
lien for repairs, 801
nature of contract, 819
pledge of car, 800, 820
possession, recovery of, 820
possession, seizure by seller, 824
remedies of seller, 819
removal from state, 820
rights of purchaser, 820
right of purchaser to complete purchase, 825
seller not owning machine at time of contract, 818
title to property, 820
vendor's lien, 819
conversion by dealer, 814
corporation, agent, purchase by, 811, 812
credit on old machine, 816
damages for refusal to accept, 815
dealer's agency, 832
dealer's lien, 814
defects, warranties against, 818
delivery, 813
by dealer, 813, 814
refusal to accept, 815
deposits with third persons, 814
evidence, oral representations not amounting to fraud, 831
AUTOMOBILES—Continued.
Sales,
evidence,
parol to vary written contracts, 830
false representations, 826–829
fraud, 826
bill of sale, 828
creditor's rights, 829
estoppel to assert title, 828
investigation by purchaser, 827
model and condition of car, 826, 827
persons liable for wrongs, 828
purchase from one not owner, 828
remedies of purchaser, 827
representations not amounting to, 831
rescission, 827, 828
transfer of vehicle, 829
installment payments, 818, 819
misrepresentation, 826–829
model, misrepresentation, 817, 826
old machine, turning in, 816
oral promises, 831
passing title, 813
price, action for, 815, 816
purchase by wife, 812
refusal to accept, 813
rescission, 811
second-hand machine as new, 826, 827
territory, contract for, 832
vendor's lien, 814
warranties, 817
warranty, pleading, 818
wife as agent of husband, 812
written contracts, parol evidence, 830
School, care required near, 847
Scope of article, 775
Signals, approaching pedestrian from behind, 874
intersections, turning corners, 903
noise of motor as sufficient warning, 838
speed at intersections, 904
time to make warning available, 838
towing, warning of rope, 838
Speed, bridges, speed at, 902
business district, judicial notice, 962
careful driving, 844
conflict of laws, 790–795
criminal prosecutions, 1009
evidence of negligence, 844

[The numbers in this Index refer to pages]

AUTOMOBILES—Continued.
Speed,
evidence of negligence,
admissions, 972, 973
estimates as to, 977
ordinances, 975
unlawful speed, 979
instructions as to, 990
intersections, control of speed, 905
excessive speed, 904
view obstructed, 905
lights on car, 845
negligence, exceeding limit, 843
night-time, 845
passengers, statutory prohibition of, 845
pedestrian, injury, 873, 929
proximate cause of injury, 928
railroad crossing, 916
obstructed view, 921
regulation of, see Regulation
roadway and traffic conditions, 845
skidding machine, 929
stopping, possibility of, 845
street-cars, 913
street railway crossings, 911
unregistered machine, 781
Speed limit, fixing as not a license, 843
misdemeanor, 845
violation as negligence, 843
Statutes, survey of, 776
Steam roller, helper injured, 889
Stopping after accident, criminal offense, 1010
validity of requirement, 788
Street-cars, collisions with, 892
duty to persons boarding or alighting from, 875
last clear chance doctrine, 937
Street railway crossing, company's negligence, instances of, 914
duty of company, 912
duty of driver, 912
motorist's negligence, instances of, 913
motorman, duty of, 913
speed of street-cars, 912, 913
Street railways, appeal, grounds for reversal, 947
crossing tracks generally, 911
evidence, collision at crossing, 985
findings as to negligence, 945
instructions in actions against, 985–1009
duty of motorman, 999
failure to instruct in terms, 1003
AUTOMOBILES—Continued.
Supply station, negligence of employee, 799
Survey of law, 776
Taxicab, exemption of, 809
Theft, see Larceny
Title of act, sufficiency, 786
Towing car, evidence, 973
rights and duties, 838
tripping over rope, 838
Trespasser, unregistered machine as, 781
Trial, see Jury
burden of proof, 962
contributory negligence, 965
instruction as to, 1007
criminal offense, cross-examination and redirect examination, 1016
cross-examination and rebuttal, 978
examination of witnesses, 939
findings, exoneration of servant, 945
inconsistent, 943
special, 942
sufficiency of, 942
unsupported by evidence, 945
inspection of vehicle, 940
instructions, see Instructions
issues and proof, 960
new trial, 947
criminal prosecution, 1019
verdict, 941
joint tort-feasors, 941
Turning corners, see Intersections
Turning into truck's path, 930
Unregistered machine, duty to, 781
Value, damages for detention, 811
Verdict, direction of, 941
negligence and contributory negligence, 941
Warning, see Signals
Willful injury, allegations in pleading, 953
instructions as to, 989
issue as to negligence, 960
Witnesses, questions by court, 939

AVULSION—
See cross-reference, 1020

AWARD—
See cross-reference, 1020

BAGGAGE—
See cross-reference, 1020

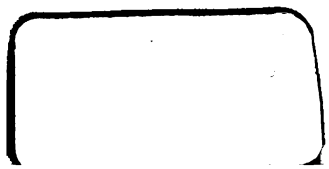
[The numbers in this Index refer to pages]

BAIL AND RECOGNIZANCE—
Actions on bonds, 1070
complaint, 1070
defenses, 1072
judgment, 1073
parties, 1072
After conviction, 1033
discretion, 1034
extraordinary circumstances, 1036
ordering accused into custody, 1038
Allowance, 1043
Amount, 1047
appeal from order, 1049
excessive bail, 1049
general rules, 1047
increase, 1050
reduction, 1050
Appeal, amount of bail, 1049
application, review of proceedings, 1044
authority to admit to bail pending, 1041
pending, 1033, 1034
Application, 1042
duty of court or judge, 1042, 1043
habeas corpus, 1044
notice of, 1043
review of proceedings, 1044
second application, 1044
to whom made, 1042
Authority to admit, 1040
before conviction, 1040
before indictment, 1040
magistrate of another county, 1040
misdemeanor cases, 1041
pending appeal, 1041
rearrest and remand, 1041
Before conviction, 1026
Bond, see Undertaking
Capital cases, 1026–1028
before conviction, 1028
extraordinary circumstances, 1029
indictment, effect of, 1031, 1032, 1033
matters to be considered, 1030
"presumption great," 1029
proof is evidence, 1029
Cash bail, 1052
Civil cases, 1074
amount, reduction of, 1077
cash bail, 1077
commitment to state hospital, 1075
contempt proceedings, 1075

BAIL AND RECOGNIZANCE—Continued.
Civil cases, deposit of money or property, 1077
deposit, disposition of, 1078
exoneration, 1079
sheriff's liability and exoneration of, 1080
proceedings for admission, 1076
qualification and justification, 1078
reimbursement of bail, 1081
right to bail, 1074
undertaking, 1076
Code provisions, 1025
Common-law rules, 1025
Complaint and actions on bonds, 1070
Constitutional and statutory provisions, 1025
Criminal cases, 1025
Custody, ordering accused into, 1038, 1039
Defenses to action on bond, 1072
Definitions and distinctions, 1023, 1024
Denial of bail, 1043
Deposit in lieu of, 1052
application of to judgment or fine, 1053
arrest of judgment, 1055
bonds, 1052
return of, 1054, 1055
surety, deposit by, 1055, 1056
third person, deposit by, 1055
Discharge, 1065
code provisions, 1065
dismissal of action, 1067
interference by obligee, 1067
setting aside indictment, 1066
surrender of defendant, 1065
sustaining demurrer, 1067
warrant from improper county, 1067
Discharge of prisoner, 1059
Discretion after conviction, 1034, 1035
Excessive bail, 1049
Exoneration, see Discharge
Extraordinary circumstances, 1036, 1037
Forfeiture of bail, 1067
limitation of rule as to, 1069
payment into county treasury, 1068
trust property conveyed as security, 1069

[The numbers in this Index refer to pages]

BAIL AND RECOGNIZANCE—Continued.
Habeas corpus for purpose of giving, 1044
application to supreme court, 1046
Increase, 1050
Judgment in action on bond, 1073
Justification of bail, 1058
Liability of bail, 1064
statutory obligation, 1065
time when liability attaches, 1065
Magistrate, see Authority
Money in lieu of bail, 1052, 1053
Object of bail generally, 1023
Parties to action on bond, 1072
Pending appeal, 1033
Pleading and actions on bonds, 1070
Power, see Authority
Reduction, 1050, 1051

BAIL AND RECOGNIZANCE—Continued.
Right to bail, 1025
Scope of article, 1023
Sureties, see Undertaking
Terms used in code, 1025
Undertaking, 1056
acknowledgment, 1063
certificate, 1063
discharge of prisoner, 1059
distinguished from recognizance, 1056
formal requisites, 1062
justification of sureties, 1057, 1058
nature of, 1056
onerous provisions, 1061
qualifications of bail, 1057
recitals, in, 1060
recognizance distinguished, 1058
reforming bond, 1063
terms of, 1060
variance from statute, 1061

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